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NORTH DAKOTA SUPREME COURT REVIEW

The Supreme Court Review briefly summarizes the important decisions rendered in 1984 by the North Dakota Supreme Court. The purpose of the review is to indicate cases of first impression and cases that significantly affect earlier interpretations of North Dakota law.

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ADMINISTRATIVE PROCEDURE

Hammond v. North Dakota State Personnel Board

In *Hammond v. North Dakota State Personnel Board*[1] Howard Hammond appealed from a judgment by the District Court of Burleigh County which affirmed a decision by the State Personnel Board to terminate Hammond as chief chemist in the State Laboratories Department.[2] On appeal the supreme court first considered whether the State of North Dakota Personnel Policies Manual (Manual), which had never been published in the North Dakota Administrative Code, was binding as a part of Mr. Hammond's employment contract.[3] Chief Justice Erickstad noted that since the State had promulgated the Manual as part of its personnel policy and procedure, the State must comply with the Manual's provisions concerning termination for cause.[4] The court concluded that the Manual required the Personnel Board to make findings as to whether the reasons given in Hammond's termination notice were supported by the evidence and whether the reasons given constituted just cause.[5]

Hammond specifically contended that the procedure afforded him offended the minimum requirements of a fair hearing under the Administrative Agencies Practices Act.[6] The court agreed, finding that the Personel Board improperly delegated its responsibility to a hearing examiner.[7] The Personnel Board had made it a common practice to base its decision solely upon a review of a hearing examiner's report and recommendation and actually believed that Board members were not to examine the evidence independently.[8] Chief Justice Erickstad concluded that the Board had a duty to review the record and determine whether Hammond's dismissal was based on just cause.[9] Consequently, the

1. 345 N.W.2d 359 (N.D. 1984).
2. Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 360 (N.D. 1984).
3. *Id.* at 360-61.
4. *Id.* at 361.
5. *Id.* at 361-62.
6. *Id.* at 362. *See* N.D. CENT. CODE §§ 28-32-01 to -21 (Supp. 1983).
7. 345 N.W.2d at 362-63.
8. *Id.* at 363.
9. *Id.* at 364.

court remanded the case to the Board for a redetermination based on the record.[10]

In separate opinions written by Justice VandeWalle and Justice Pederson, both justices expressed a concern for misconstruing the majority's opinion by requiring all members of an administrative agency that uses a hearing officer or referee to read every word of the record before arriving at a conclusion.[11] Both justices believed that the Board could properly review the evidence without examining every bit of evidence.[12]

AGENCY

Horejsi v. Anderson

In *Horejsi v. Anderson*[13] a baby sitter hired by the infant plaintiff's parents administered a severe beating to the plaintiff, then less than one year old, resulting in severe and permanent injuries to the infant.[14] The plaintiff's guardian ad litem brought a suit on the plaintiff's behalf alleging separate counts of negligence against the babysitter and the plaintiff's parents, and respondeat superior liability against the babysitter's parents and the plaintiff's parents.[15] The claim against the babysitter and her parents was settled and they received a full and final release approved by the court, discharging them from all further claims arising out of the incident.[16]

The Supreme Court of North Dakota addressed the issue of whether the release of a servant also releases the master from respondeat superior liability.[17] On appeal the plaintiff argued that under the Uniform Contribution Among Tortfeasors Act[18] the release of the servant (the babysitter) does not release the master (the plaintiff's parents).[19] The plaintiff's parents argued that the Uniform Act does not apply to the derivative or vicarious liability of masters or principals.[20] The court agreed that the Uniform

10. *Id.*
11. *Id.* (VandeWalle, J., concurring specially); *Id.* (Pederson, J., concurring in part, dissenting in part).
12. *Id.* (VandeWalle, J., concurring specially); *Id.* (Pederson, J., concurring in part, dissenting in part).
13. 353 N.W.2d 316 (N.D. 1984).
14. Horejsi v. Anderson, 353 N.W.2d 316, 317 (N.D. 1984).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id. See* N.D. CENT. CODE §§ 32-38-01 to -04 (1976).
19. 353 N.W.2d at 317. This is the view adopted by a majority of states that have adopted the Uniform Contribution Among Tortfeasors Act and have subsequently addressed this issue. *Id.*
20. *Id.*

Contribution Among Tortfeasors Act applied to the master-servant relationship,[21] but since pertinent sections of the North Dakota Act have been impliedly repealed by subsequent legislative adoption of comparative negligence,[22] the court determined that the case law from other jurisidictions was inapposite.[23]

In holding that the release of the servant for his wrongful conduct also releases the master from vicarious liability based on respondeat superior, the court construed North Dakota Century Code sections 32-38-02[24] and 32-38-04[25] together. The court stated that under North Dakota Century Code section 32-38-04(1), the release of the servant reduces the claim against other non-released tortfeasors to the extent of the relative degree of fault (percentage of negligence) attributable to the released wrongdoer servant.[26] The court found that the "percentage of negligence" attributable to the conduct of the servant constitutes the entire "single share" of liability attributable jointly to the master and servant.[27] The court reasoned that because this "percentage of negligence" represented the "single share" of liability covered by the common liability of the master and servant, the master is necessarily released from vicarious liability for the servant's misconduct when the plaintiff releases the servant.[28]

BOARDS AND COMMISSIONS

Conway v. Board of County Commissioners

In *Conway v. Board of County Commissioners*[29] a former deputy sheriff appealed from a district court judgment affirming the Grand Forks Board of County Commissioners' (Board) finding that he was not entitled to receive payment for unused compensatory time

21. *Id.* at 318.

22. *Id.* In *Bartels* the court held that the adoption of the comparative negligence statute impliedly amended the Uniform Contribution Among Tortfeasors Act to provide that the good faith release from liability of one tortfeasor reduces the claim against the other tortfeasors by the percentage of negligence attributable to the released joint tortfeasor. *Id.* (citing Bartels v. City of Williston, 276 N.W.2d 113, 121 (N.D. 1979)). *See* N.D. CENT. CODE § 9-10-07 (1975) (comparative negligence); N.D. CENT. CODE § 32-38-04 (1) (1976) (Uniform Contribution Among Tortfeasors Act).

23. 353 N.W.2d at 318.

24. N.D. CENT. CODE § 32-38-02 (1976). This section provides that "[i]n determining the pro rata shares of tort-feasors in the entire liability: . . . 2. If equity requires the collective liability of some as a group shall constitute a single share." *Id.* The commissioner's comment to this section reveals that included in the section is the rule of equity which requires class liability, including common liability arising from vicarious relationships, to be treated as a single share. 353 N.W.2d at 318.

25. *Id.* at 318-20.

26. *Id.* at 318.

27. *Id.*

28. *Id.*

29. 349 N.W.2d 398 (N.D. 1984).

earned prior to voluntary termination of his employment.[30] The Board authorized deputy sheriffs to earn compensatory time when on standby or on-call status.[31] Conway claimed that when he terminated his employment as a deputy sheriff with Grand Forks County, he had accrued 841.35 hours of earned compensatory time that he had been unable to use because his requests to take time off had been denied by his superiors.[32] The controlling issue was whether the Board had acted arbitrarily, capriciously, or unreasonably in denying Conway's claim for payment for his unused compensatory time.[33] The supreme court held that Conway was denied his right to use his compensatory time which constituted a breach of his employment contract with the county and thus, he was entitled to damages.[34]

The supreme court stated that the resolution of April 1979 authorizing compensatory time was a valid action of the Board and was the result of contract negotiations between the Board and the county deputy sheriffs.[35] Therefore, the resolution was a binding element of the county's contractual employment relationship with Conway.[36] The court further stated that the Board had a legal duty to honor its commitment to provide compensatory time off to Conway.[37] The court agreed with a holding by the Missouri Court of Appeals which stated that unless an employee received his pay for unused compensatory time, the time would not be compensatory.[38] Since Conway had made requests to use his compensatory time and those requests were denied, Conway's right to receive compensatory time was breached.[39] This breach entitled Conway to a contract remedy of damages for the unused compensatory time that he had earned.[40] The court specifically reserved the question whether an employee who had never

30. Conway v. Board of County Comm'rs, 349 N.W.2d 398, 399-400 (N.D. 1984). Conway filed a claim for payment with the Board of County Commissioners which was denied. *Id.* at 399. He appealed the Board's decision to the district court pursuant to § 11-11-39 of the North Dakota Century Code. *Id.*

31. *Id.* The county passed a resolution in April 1979 giving deputies one hour of compensatory time for each three hours of standby or actual on-call time. *Id.* The resolution became effective April 3, 1979. *Id.*

32. *Id.*

33. *Id.* at 400.

34. *Id.* The case was remanded so that damages could be determined. *Id.* at 401.

35. *Id.* at 400.

36. *Id.* The supreme court cited Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359 (N.D. 1984) as support for the proposition that the Board's resolution became a binding element of Conway's employment contract. 349 N.W.2d at 400.

37. *Id.*

38. *Id. See* Bruce v. City of St. Louis, ___ Mo. App. ___, 217 S.W.2d 744 (1949).

39. 349 N.W.2d at 400. Conway asserted that many of his requests to use compensatory time were denied by his superiors because the county sheriff's department had manpower shortages. *Id.* at 399.

40. *Id.* at 400.

his compensatory time would be entitled to payment for unused compensatory time.[41]

In a strong dissent, Justice VandeWalle asserted that the majority was usurping the Board of Commissioners' right to develop its own policy for compensatory time.[42] Justice VandeWalle believed the court had no right to authorize payment for unused compensatory time when the Board of Commissioners did not adopt such a provision.[43] He further questioned whether the majority would allow compensation if the employee had requested compensatory time only once and subsequently resigned or was terminated.[44]

CIVIL PROCEDURE

Thoring v. Bottonsek

In *Thoring v. Bottonsek*[45] the owners of Lenny's Bar, located in Bainville, Montana, appealed from a North Dakota district court order granting partial summary judgment.[46] The district court concluded as a matter of law that it had personal jurisdiction over the bar and that North Dakota's dram shop act[47] could be applied to assess liability against the Montana bar for an accident that occurred in North Dakota.[48] Lenny's contended that it lacked sufficient minimum contacts with North Dakota for the state to assert personal jurisdiction under its long arm provisions.[49] Lenny's also contended that North Dakota's dram shop act has no extraterritorial effect.[50] The supreme court addressed the question of whether North Dakota's dram shop act should be given extraterritorial effect.[51]

The supreme court noted that Montana imposes no civil liability on tavern keepers for injuries that result from furnishing intoxicating beverage to a minor or a person who is already intoxicated.[52] The court then analyzed cases from other

41. *Id.* at 400-01. The court found it important that Conway's requests to use compensatory time off had been denied by his superiors acting on behalf of the county. *Id.* at 401.
42. *Id.* at 402 (VandeWalle, J., dissenting).
43. *Id.*
44. *Id.*
45. 350 N.W.2d 586 (N.D. 1984).
46. Thoring v. Bottonsek, 350 N.W.2d 586, 587 (N.D. 1984).
47. *See* N.D. CENT CODE § 5-01-06 (1975) (statutory basis of the dram shop action). The present statute contains slightly different wording which does not affect the disposition of this appeal. 350 N.W.2d at 587 n.2.
48. 350 N.W.2d at 587.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 588.

jurisdictions and concluded that the cases which imposed civil liability on a seller of alcoholic beverages in one state for injuries sustained in another state have done so on the basis of common law negligence liability rather than statutory dram shop liability.[53]

The supreme court concluded that North Dakota's dram shop act has no extraterritorial effect in circumstances where the sale took place outside of North Dakota. Thus, the trial court had erred when it applied the law to Lenny's.[54] The determination of the inapplicability of the dram shop act was dispositive of the appeal and the court found it unnecessary to reach the issue of personal jurisdiction.[55]

COMMITMENT

In re Reidel

In *In re Reidel*[56] The Williams County Court issued a ninety day order committing Frieda Reidel for treatment and continued hospitalization at the North Dakota State Hospital.[57] Prior to the expiration of this order, the superintendent of the state hospital petitioned the Stutsman County Court for an order of continuing treatment.[58] The county court did not prepare any findings of fact as required by Rule 52(a) of the North Dakota Rules of Civil Procedure.[59] Instead, the court used a preprinted form and summarily concluded that Reidel was mentally ill and required further hospitalization.[60]

Citing to section 25-03.1-29 of the North Dakota Century Code, the supreme court held that the county court must submit findings of fact in order for the appellate court to properly review orders of involuntary commitment.[61] The court stated that a significant purpose was served by findings of fact in assuring an adequate factual basis for the court's conclusion to civilly commit

53. *Id.* at 589. *See* Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

54. 350 N.W.2d at 591.

55. *Id.*

56. 353 N.W.2d 773 (N.D. 1984).

57. *In re* Reidel, 353 N.W.2d 773, 774 (N.D. 1984).

58. *Id.*

59. *Id. See* N.D.R. Civ. P. 52(a) (trial courts must find facts specially in every action tried upon the facts without a jury).

60. 353 N.W.2d at 774. The court has previously expressed its displeasure with preprinted forms. *See In re* Gast, 345 N.W.2d 42, 46 (N.D. 1984).

61. 353 N.W.2d at 775.

mental patients.[62] The court criticized the trial court's practice of using preprinted forms.[63] While not prohibiting their use, the court found it was almost impossible to use preprinted forms and comply with the requirements of statutes and due process of law.[64]

The state hospital contested the requirement of factual findings by the lower court and claimed that the supreme court had de novo review in civil commitment cases.[65] The state hospital analogized civil commitment to juvenile court matters in which the scope of the supreme court's review is similar to trial de novo.[66] The supreme court disagreed. While noting that it did have express authority under section 27-20-56(1) of the North Dakota Century Code to review de novo in juvenile matters, no similar provisions in the chapter of the code governing civil commitment provides for de novo review.[67]

CONSTITUTIONAL LAW

State v. Kranz

In *State v. Kranz*[68] the defendant appealed his conviction of menacing, claiming that he had not affirmatively waived his constitutional right to a jury trial.[69] The supreme court noted that both the North Dakota Rules of Criminal Procedure and North Dakota statutes permit a defendant to waive trial by jury.[70] The issue on appeal was whether the defendant's conduct by standing mute and proceeding with the bench trial constituted a waiver of his right to a jury trial.[71]

The court stated that any person "accused of serious crimes" has a constitutional right to a jury trial.[72] Although the right to a jury trial in criminal matters may be waived, its great importance "precludes a defendant from waiving the right to trial by jury without the *express*, intelligent consent of the defendant and consent of the prosecutor and judge."[73] The court found that Kranz's silent

62. *Id.* at 776.
63. *Id.*
64. *Id.*
65. *Id.* at 775.
66. *Id. See* N.D. CENT CODE § 27-20-56(1) (1974); *In re* A.N., 201 N.W.2d 118, 121 (N.D. 1972).
67. *Id. See* N.D. CENT. CODE ch. 25-03.1 (Supp. 1983).
68. 353 N.W.2d 748 (N.D. 1984).
69. State v. Kranz, 353 N.W.2d 748, 749-50 (N.D. 1984).
70. *Id.* at 750. *See* N.D. R. CRIM. P. 23(a) (1984); N.D. CENT. CODE §§ 27-07.1-31, -32 (Supp. 1983); N.D. CENT. CODE § 29-16-02 (1974).
71. 353 N.W.2d at 750.
72. *Id.* The court determined that the charge involved was serious, since conviction could result in imprisonment for more than 6 months. *Id.* at 751 n.1.
73. *Id.* at 751 (emphasis in original) (footnote omitted).

conduct had not expressly and intelligently waived a jury trial.[74] Thus, even though the issue was first raised on appeal, the "constitutional dimension" of the trial court's error supported review by the supreme court.[75] Since issues of fact existed, the court ruled the error could not be deemed harmless and remanded the case for a new trial.[76]

CORPORATIONS

Downtowner, Inc. v. Acrometal Products, Inc.

In *Downtowner, Inc. v. Acrometal Products, Inc.*[77] the plaintiff, Downtowner, Inc. (Downtowner), and the defendant and third-party plaintiff, Adams, Inc. (Adams), appealed to the supreme court from a partial summary judgment.[78] Downtowner alleges that some time prior to January 1973 a corporation named Weather-Rite, Inc. (Weather-Rite) manufactured a gas-fired heater.[79] Weather-Rite, through Adams, sold the heater to Gerlach Sheet Metal for installation in the Downtowner, a Bismarck restaurant, in 1973. Plaintiffs alleged that in January 1978 the heater caused a fire which damaged plaintiffs' property.[80]

Plaintiffs alleged liability against Adams because Adams was in the chain of sale of the product.[81] Adams in turn brought claims against Weather-Rite and Acrometal Products, Inc. (Acrometal) alleging its right to indemnification pursuant to section 28-01.1-07 of the North Dakota Century Code.[82] Acrometal filed a motion for summary judgment to the district court, which was granted.[83]

Of great significance to this case is the fact that in 1974 Acrometal purchased the assets of Weather-Rite.[84] Neither the documents of transfer nor the court order approving the sale recited any assumption by Acrometal of Weather-Rite's liabilities.[85] The principal issue raised on appeal is whether North Dakota should

74. *Id.* at 752.
75. *Id.* at 753.
76. *Id.*
77. 347 N.W.2d 118 (N.D. 1984).
78. Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 119 (N.D. 1984). The district court entered summary judgment in favor of the defendant and third-party defendant, Acrometal. *Id.* The supreme court affirmed in part, reversed in part, and remanded. *Id.*
79. *Id.* The plaintiff, Downtowner, was joined by Weeda's Bath and Kitchen Shop in commencing this action alleging products liability. *Id.*
80. *Id.*
81. *Id.*
82. *Id. See* N.D. CENT. CODE § 28-01.1-07 (Supp. 1983) (indemnity of seller).
83. 347 N.W.2d at 120.
84. *Id.* In 1974 Weather-Rite was in serious financial difficulty and the company went into receivership in state court in Minnesota. *Id.* After the receivership had begun, Arcrometal purchased the assets of Weather-Rite. *Id.*
85. *Id.*

join a minority of jurisdictions which have granted a separate exception or have expanded upon the "mere continuation" exception to the general rule that a corporation which purchases the assets of another corporation does not succeed to the liability of the selling corporation.[86]

The supreme court held that Acrometal, the transferee corporation, was not liable to purchasers under the products liability theory for merely continuing its transferor's product line.[87] Acrometal did not succeed to the liabilities of the seller, Weather-Rite.[88] The court stated that the legislature and not the courts should be responsible for a rule imposing strict liability upon any successor corporation which has maintained the product line of its predecessor.[89] Therefore, with regard to this issue the supreme court affirmed the summary judgment in favor of Acrometal.[90]

The supreme court also dealt with the question of whether Acrometal, apart from liability as a successor, acquired an independent duty to warn of potential dangers presented by the heating units manufactured by Weather-Rite upon receiving notice of those dangers.[91] The supreme court stated that a determination of whether there is a nexus between Acrometal and the customers of Weather-Rite sufficient to justify the imposition of liability on Acrometal for negligent breach of duty to warn necessarily involves questions of fact regarding that relationship.[92] Therefore, the supreme court, with regard to the issue of Acrometal's alleged negligent failure to warn of defects, held that questions of fact precluded summary judgment.[93]

CRIMINAL LAW AND PROCEDURE

State v. Halvorson

In *State v. Halvorson*[94] Wayne Halvorson appealed from a

86. *Id.* at 121. Except for four well-recognized exceptions, the long-established general rule is that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation. *See* Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974). Acrometal would not be liable under either this general rule or its exceptions. 347 N.W.2d at 121.

87. 347 N.W.2d at 121.

88. *Id.* at 123.

89. *Id.* at 125. *See, e.g., Leannais,* 565 F.2d 437 (7th Cir. 1977).

90. 347 N.W.2d at 125.

91. *Id.*

92. *Id.* The supreme court stated that it is clear that a successor corporation may acquire a duty to warn people where defects in its predecessor's products come to the successor's attention. *Id.*

93. *Id.* The parties in this case conceded that discovery, with regard to the issue of Acrometal's alleged failure to warn of defects, was incomplete. *Id.*

94. 346 N.W.2d 704 (N.D. 1984).

judgment of conviction after a jury found Halvorson guilty of murder for the shooting death of his estranged wife, Llana Halvorson.[95] Halvorson raised four issues on appeal: Whether the trial court's instruction to the jury on the elements of murder defeated the distinction between murder and manslaughter; whether the trial court erred in admitting into evidence tape recordings of telephone conversations that took place prior to Halvorson's arrest; whether the trial court abused its discretion in limiting Halvorson's cross-examination of the police detective who testified as to the statement obtained from Halvorson during the custodial interview; and whether the trial court erred in allowing an amendment to the criminal information on the day of trial.[96] The North Dakota Supreme Cout affirmed Halvorson's conviction.[97]

The supreme court first considered Halvorson's contention that the jury instructions completely defeated the distinction between murder and manslaughter and lowered the state's burden of proof of the offense of murder.[98] The trial cout added the term "willfully" to the statutory language of section 12.1-16-01 when it instructed the jury on the North Dakota statutes.[99] The supreme court stated that its earlier ruling in *State v. Skjonsby*[100] was support for the proposition that the term "willfully" must be inserted in a jury instruction on the culpability requirement for murder.[101] The court pointed out that the distinction between murder and manslaughter is maintained by the operative grading language in section 12.1-16-01(2) of the North Dakota Century Code.[102] The court stated that the trial court's jury instructions taken as a whole were clear and not misleading.[103]

Halvorson contended that the trial court erred when it admitted into evidence six hours of recorded telephone conversations between Halvorson and law enforcement officers.[104] During trial Halvorson objected to the admission of the tapes on

95. State v. Halvorson, 346 N.W.2d 704, 705-06 (N.D. 1984). Murder is a class AA felony. N.D. CENT. CODE § 12.1-16-01 (Supp. 1983).

96. 346 N.W.2d at 705.

97. *Id.* at 712.

98. *Id.* at 707-09.

99. *Id.* at 706. The court's instruction on "SOME STATUTES INVOLVED IN THE ALLEGED OFFENSE" stated that a person is guilty of murder under § 12.1-16-01 of the North Dakota Century Code if he "[w]illfully causes the death of another human being under circumstances manifesting an extreme indifference to the value of human life." *Id.* at 706-07. This language was taken verbatim from the statute except for the word "willfully." *See* N.D. CENT. CODE § 12.1-16-01 (Supp. 1983).

100. 319 N.W.2d 764 (N.D. 1982).

101. 346 N.W.2d at 708.

102. *Id. See* N.D. CENT. CODE §§12.1-16-01, -02 (Supp. 1983).

103. 346 N.W.2d at 709. If the jury instruction as a whole correctly advises the jury as to the law, they are sufficient even if a portion standing alone may be misleading. *Skjonsby*, 319 N.W.2d 764, 774 (N.D. 1982).

104. 346 N.W.2d at 710.

the grounds of relevancy and prejudice.[105] On appeal Halvorson contended that the tapes were inadmissible because the tapes violated his fifth amendment privilege against self-incrimination since he was not given any *Miranda* warnings during the telephone conversations.[106] The supreme court upheld the trial court's ruling that the tapes were admissible because the trial court had considered relevancy when it ruled on the motion.[107] The supreme court held that Halvorson's constitutional rights were not violated because *Miranda* applies only when a defendant is in custody.[108] The telephone conversations took place prior to Halvorson's arrest, so the statements were not made in a custodial situation.[109]

The supreme court briefly addressed the remaining two issues and found that the trial court's rulings were not error.[110] The trial court's ruling limiting Halvorson's cross-examination of the detective who took Halvorson's statement was not error because the evidence that Halvorson wanted to obtain through cross-examination was admitted in one form or another during the course of the trial.[111] The endorsement of additional witnesses on the information on the day of trial was within the trial court's discretion.[112] The supreme court found no prejudicial errors and refused to disturb the jury's verdict.[113]

State v. Perbix

In *State v. Perbix*,[114] Perbix appealed from his conviction for possession of marijuana.[115] Perbix was charged with possession of marijuana after a search of a trailer home.[116] The search was authorized as a condition of Perbix's probation in a prior conviction.[117] The search was conducted by police officers rather than by Perbix's probation officer.[118]

Perbix first challenged the constitutionality of section 19-03.1-

105. *Id.*; N.D. R. EVID. 402, 403.
106. 346 N.W.2d at 710-11.
107. *Id.* at 711.
108. *Id.*
109. *Id.*
110. *Id.* at 709-10, 712.
111. *Id.* at 710.
112. *Id.* at 712. Halvorson had actual notice of the twenty-two proposed additional witnesses before trial. *Id.* In addition, most of the witnesses whose names were added to the information were foundation witnesses. *Id.*
113. *Id.*
114. 349 N.W.2d 403 (N.D. 1984).
115. State v. Perbix, 349 N.W.2d 403, 404 (N.D. 1984).
116. *Id.*
117. *Id.* at 404-05.
118. *Id.* at 405.

23(3) of the North Dakota Century Code,[119] which makes possession of a controlled substance a strict liability offense.[120] The supreme court found that Perbix did not adequately raise or present a constitutional challenge to the statute because he did not set forth specific objections supported by rationale.[121]

Perbix next asserted that the supreme court should reconsider its prior decison upholding the validity of the search resulting in his prosecution.[122] The court held that an affidavit of a citizen member of a legislative committee stating that the legislative intent was to allow warrantless searches of a probationer only by his probation officer was not a legal or justifiable ground to relitigate the issue.[123]

Finally, Perbix asserted that he was denied a fair trial because of the prosecutor's refusal to dismiss charges of possession of contraband against Sharon Farrand or grant her immunity.[124] Farrand was originally charged as a co-defendant with Perbix but was not subsequently prosecuted.[125] Perbix argued that he was prevented from obtaining Farrand's potentially favorable testimony when he called her to testify at his trial because she asserted her fifth amendment privilege not to testify.[126] The court found that because the prosecutor did not attempt to interfere with Farrand's right to take the witness stand at Perbix's trial or to discourage her from testifying on his behalf, Perbix had no right to compel the state to dismiss charges against Farrand or grant her immunity.[127] Furthermore, the court noted that a criminal defendant cannot compel the state to grant immunity to a defense witness.[128] Therefore, the court determined that the prosecutor's decision did not violate Perbix's right to a fair trial.[129]

In a special concurrence, Justice VandeWalle suggested that the prosecutor's refusal to dismiss the action against Farrand may well have discouraged her from testifying.[130] Justice VandeWalle concluded that the majority opinion reached the correct result, however, because nothing in the record indicated what Farrand would testify to if she were required to testify.[131] In order to reverse

119. *Id.* at 404. *See* N.D. CENT. CODE § 19-03.1-23(3) (Supp. 1983) (Uniform Controlled Substances Act).
120. 349 N.W.2d at 404 (citing State v. Rippley, 319 N.W.2d 129 (N.D. 1982)).
121. 349 N.W.2d at 404.
122. *Id.* at 405 (citing State v. Perbix, 331 N.W.2d 14 (N.D. 1983)).
123. 349 N.W.2d at 405.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 406 (VandeWalle, J., concurring specially).
131. *Id.*

a conviction, Justice VandeWalle stated that more was required than mere speculation that Farrand's testimony would be beneficial to Perbix.[132]

CRIMINAL PROCEDURE

State v. Denny

In *State v. Denny*[133] the defendant appealed his conviction of delivering a controlled substance.[134] The issues on appeal were (1) whether defendant's right to due process was violated by a delay of nearly nine months in commencing prosecution, and by the trial court's failure to suppress in-court identification based on a suggestive photographic identification[135] and (2) whether he was denied a fair trial by the refusal of the trial court to order disclosure of the identity of a confidential informer.[136]

The supreme court noted summarily that the constitutional right to a speedy trial "does not attach until a defendant 'in some way becomes an 'accused'.' "[137] Nevertheless, the court went on to consider whether the pre-accusatorial delay might have violated the defendant's right to due process of law.[138] Such a claim requires more than proof of actual prejudice.[139] The reasons for the delay are also an important factor.[140] Intentional delay by the prosecutor for the purpose of obtaining an advantage over the accused is impermissible if the defendant is thereby prejudiced.[141] The court in *Denny* found that the delay was related to the continuing investigation of drug transactions.[142] The court found this to be a legitimate reason for delay and also concluded that Denny had failed to show actual prejudice resulting from the delay.[143]

On the defendant's claim that the trial court should have ordered disclosure of a confidential informer's identity, the supreme court stated the general rule that disclosure is not required.[144] An exception exists, however, when the informer may

132. *Id.*
133. 350 N.W.2d 25 (N.D. 1984).
134. State v. Denny, 350 N.W.2d 25, 26-27 (N.D. 1984).
135. *Id.* at 27. *See* U.S. CONST. amend. VI; N.D. CONST. art. I, § 12 (right to speedy trial guaranteed).
136. 350 N.W.2d at 27.
137. *Id.* (quoting United States v. Marion, 404 U.S. 307, 313 (1971)).
138. 350 N.W.2d at 27.
139. *Id.* at 27-28.
140. *Id.* at 28.
141. *Id.*
142. *Id.*
143. *Id.* at 28-29.
144. *Id.* at 29 (citing N.D. R. EVID. 509).

" 'give testimony relevant to any issue in a criminal case.' "[145] Disclosure may be justified if the interests of the defendant outweigh the public's interest in effective law enforcement.[146] Applying a totality of the circumstances test, the supreme court concluded that information provided by the informant was substantiated by other testimony and that Denny had not met his burden of demonstrating an exception to the nondisclosure privilege.[147]

Denny's final claim of prejudice was that an officer's in-court identification was based on a suggestive photographic identification and thus denied him due process of law.[148] The allegedly suggestive procedure was the officer's viewing of a single photograph of Denny in a police file after seeing him during the drug transaction.[149] The court stated that "single photograph identifications should generally be avoided because they are unduly suggestive . . . ."[150] Whether such identification is unduly suggestive depends on the witness' prior opportunity to view the defendant and his degree of attention, the accuracy of the prior description, the certainty of the later identification, and the time between the crime and the photographic identification.[151] In the present case, the court found that the officer had a good view of the defendant at the crime scene, was trained to pay attention to detail, and was highly certain of his identification.[152] Further, the viewing occurred the same evening as the crime.[153] The court thus held that the suggestive procedure did not result in a substantial likelihood of misidentification.[154]

State v. Gross

In *State v. Gross*[155] the supreme court upheld Gross' conviction of gross sexual imposition in connection with his twelve-year old daughter.[156] At a prior juvenile court proceeding, Gross admitted, after being advised of his right to remain silent and that any admission could be used in any subsequent criminal proceeding,

145. 350 N.W.2d at 29 (quoting N.D. R. EVID. 509 (c) (2)).
146. 350 N.W.2d at 29.
147. *Id.* at 29-30.
148. *Id.* at 30.
149. *Id.*
150. *Id.*
151. *Id.* at 31.
152. *Id.*
153. *Id.*
154. *Id.*
155. 351 N.W.2d 428 (N.D. 1984).
156. State v. Gross, 351 N.W.2d 428, 429 (N.D. 1984). *See* N.D. CENT. CODE § 12.1-20-03 (Supp. 1983).

that he had an incestuous relationship with his daughter.[157] On the issue of whether Gross' fifth amendment right against compelled self-incrimination was violated when the state in the subsequent criminal trial used his admission made at the juvenile court proceeding, the court held that Gross had knowingly and intelligently waived his right against compelled self-incrimination.[158] The court noted that he was not under arrest at the time of the juvenile court proceeding, that he had been represented by counsel at the juvenile hearing, that he had been advised of his right not to incriminate himself, and that he had been informed of the consequences if he made any admission.[159]

On the issue whether the jury should have been instructed that gross sexual imposition includes a fourth element that the sexual contact had to be done for the purpose of arousing or gratifying sexual desire, the court held that the jury finding that Gross had engaged in sexual intercourse established beyond a reasonable doubt that the sexual act was for the purpose of arousal or sexual gratification.[160] Therefore it was harmless error that the jury was not instructed on the fourth element.[161]

Gross had requested a new jury panel prior to the criminal trial, alleging that recall of the same panel members after the court had dismissed them and telling the panel that the parties had reached a settlement, constituted actual bias of each panel member.[162] The court ruled that existence of actual bias must be determined from *voir dire* examinations of prospective jurors [163] and that the recall was not actual bias per se.[164] The court presumed the jury acted impartially, absent evidence to the contrary.[165]

On appeal Gross also asserted that the trial court erred in denying his motion to exclude the prejudicial testimony of a physician.[166] At trial the daughter's examining physician testified that the examination of the daughter revealed that her hymen was not intact.[167] The testimony was contrary to the medical report prepared by the physician and distributed to Gross prior to trial.[168] The physician explained the inconsistency by stating that the

157. 351 N.W.2d at 430.
158. *Id.* at 431-32.
159. *Id.* at 432.
160. *Id.* at 430-31 (citing State v. Jenkins, 326 N.W.2d 67 (N.D. 1982)).
161. 351 N.W.2d at 431.
162. *Id.* at 432. *See* N.D. CENT. CODE § 29-17-35(2) (1974) (defining actual bias).
163. 351 N.W.2d at 432 (citing State v. Ternes, 259 N.W.2d 296 (N.D. 1977), *cert. denied,* 435 U.S. 944 (1978)).
164. 351 N.W.2d at 433.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

written report was incorrect.[169] The court found that Rule 403 of the North Dakota Rules of Evidence grants trial courts wide discretion as to the introduction of evidence.[170] The court concluded that any unfair prejudice could have been remedied by a motion for a continuance.[171] Because no motion for a continuance was made, the court held that the trial court properly denied Gross' motion to exclude the physician's testimony.[172]

Finally, Gross argued that the jury should have been instructed to view the social worker complainant's testimony with caution.[173] The court stated that such a cautionary instruction would allow the complainant to be treated differently from other witnesses and from other victims of crime.[174] The court determined that a general instruction concerning the jury's duty to weigh the evidence properly protected Gross' right to a fair trial.[175]

State v. Hegland

In *State v. Hegland*[176] the defendant appealed from the trial court's order denying his motion for a new trial based on newly discovered evidence.[177] The defendant was convicted of contributing to the delinquency of a minor and delivering alcoholic beverages to a person under twenty-one years of age.[178] The state's key witness was a minor who testified that he consumed beer while in the defendant's residence and in the presence of the defendant.[179]

Approximately a month after his conviction the defendant filed his motion for a new trial, accompanied by two affidavits stating that the minor witness had not drunk any beer in the defendant's residence on the night in question.[180] This motion was denied.[181] Nearly five months later the defendant filed another motion, this one supported by an affidavit of the minor witness

169. *Id.*
170. *Id. See* N.D. R. EVID. 403.
171. 351 N.W.2d at 433.
172. *Id.*
173. *Id.* at 434.
174. *Id.*
175. *Id.*
176. 355 N.W.2d 803 (N.D. 1984).
177. State v. Hegland, 355 N.W.2d 803, 804 (N.D. 1984). The motion for a new trial was brought pursuant to Rule 33(b) of the North Dakota Rules of Criminal Procedure, which specifies that the motion must be supported by affidavits and brought within 30 days after discovery of the new facts. *Id.* at 804 (citing N.D. R. CRIM. P. 33(b) (1984)).
178. 355 N.W.2d at 804.
179. *Id.*
180. *Id.*
181. *Id.* at 804-05.

stating that he had lied during the trial.[182] On appeal from the denial of the second motion for a new trial, the supreme court considered whether the motion should have been granted on the grounds of newly discovered evidence.[183]

The court first noted that a trial court's decision whether to grant a new trial is discretionary and will not be set aside absent an abuse of discretion.[184] Moreover, a new trial should not be granted on the basis of recanted or allegedly perjured testimony unless it appears that a different verdict would be reached.[185] The court stated a three-prong test for granting a new trial based on false testimony:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
> (b) That without it the jury *might* have reached a different conclusion.
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.[186]

Without adopting this rule, the court found that the first and third prongs had not been met.[187] The court stated that because the defendant claimed to be innocent, he must have known at trial that the witness' testimony was false.[188] He could have discovered the testimony prior to trial by requesting a list of prosecution witnesses and their statements.[189] Thus, the defendant could not now complain of surprise.[190] Finding no abuse of discretion, the supreme court affirmed the order denying a new trial.[191]

State v. Kunze

In *State v. Kunze*,[192] Kunze appealed his sentencing on two state counts of theft of property and two federal counts of possession of a

182. *Id.* at 805.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 806 (quoting the "*Larrison* rule" [Larrison v. United States, 24 F.2d 82 (7th Cir. 1928)] as set forth in State v. Caldwell, 322 N.W.2d 574, 584-85 (Minn. 1982)).
187. 355 N.W.2d at 806.
188. *Id.*
189. *Id. See* N.D. R. CRIM. P. 16(f).
190. 355 N.W.2d at 806-07.
191. *Id.* at 807.
192. 350 N.W.2d 36 (N.D. 1984).

firearm.[193] Kunze had requested, under Rule 35 of the North Dakota Rules of Criminal Procedure, that the state sentence be made to run concurrently with the time served under the federal sentence.[194] The state district court amended the state sentence by changing the time when the state sentence commenced to the date Kunze was released from serving the federal sentence.[195] Kunze subsequently made application under the Uniform Post-Conviction Act[196] to have the original sentence reinstated and to have the state sentence run concurrently with the federal sentence.[197] Kunze additionally requested credit for the time he had already served since September 15, 1982.[198]

The supreme court addressed the question of whether the change in the original sentence was a reduction of sentence so as to come within Rule 35(b) of the North Dakota Rules of Criminal Procedure.[199] The court relied on section 12.1-32-02(6) of the North Dakota Century Code[200] to determine that the original sentence had commenced at twelve o'clock noon on September 15, 1982 and that in effect the amended sentence was erroneous as it changed the time when the state sentence was to commence.[201] The supreme court found section 12.1-32-11(1) of the North Dakota

193. State v. Kunze, 350 N.W.2d 36, 37 (N.D. 1984). Kunze was sentenced to five years in the North Dakota State Penitentiary to commence at 12:00 noon on September 15, 1982 on count one, and to a five years' suspended sentence on count two. *Id.* at 37. Eight days after the state imposed its sentence for theft of property, the United States District Court found Kunze guilty on two counts of possessing a firearm after having been previously convicted of a felony and sentenced him to two years on each count, to run consecutively. *Id.* The United States district judge also recommended that the federal sentence be served at the state penitentiary and that the sentence run concurrently with the sentence imposed in state district court on September 15, 1982. *Id.*

194. *Id.*

195. *Id.*

196. N.D. CENT. CODE ch. 29-32 (1974).

197. 350 N.W.2d at 37-38. Kunze contended that the amended sentence, dated December 1, 1982, changing the time when the state sentence commenced, violated Rule 35, North Dakota Rules of Criminal Procedure, and his protection against double jeopardy as guaranteed by Article V of the United States Constitution. *Id.*

198. *Id.* at 38.

199. *Id. See* N.D. R. CRIM. P. 35(b). Rule 35(b) provides:

> (b) Reduction of Sentence. The sentencing court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation constitutes a permissible reduction of sentence under this subdivision. Relief under this rule may be granted by the court only upon motion of a party or its own motion and notice to the parties. If the sentencing court grants relief under this Rule, it shall state its reasons therefor in writing.

Id.

200. N.D. CENT. CODE § 12.1-32-02(6) (1976). Section 12.1-32-02(6) provides that a "term of imprisonment commences at the time of sentencing . . . unless the court orders the term to commence at some other time." *Id.*

201. 350 N.W.2d at 38-39.

Century Code as expressive of the state and federal courts' need for "comity and a spirit of cooperation" in the commitment of persons in penal facilities.[202] The court stated that the state district court's amendment to the original sentence prevented the sentence from being served concurrently, in effect extending Kunze's sentence for four years.[203] Accordingly, the court held that the amended judgment and sentence increased Kunze's penalty in derogation of Rule 35 of the North Dakota Rules of Criminal Procedure.[204] The court ordered that the amended judgment and sentence of the state district court be vacated and the case remanded with the instruction that Kunze be given credit for time served both in county jail and in any federal correctional institution and that Kunze serve his remaining time at the state penitentiary.[205]

State v. Larson

In *State v. Larson*[206] the state appealed a lower court ruling suppressing evidence against the defendants, who were charged with violations of state game laws.[207] The North Dakota Supreme Court affirmed.[208]

Defendants' alleged illegal waterfowl hunting activities had been observed by game warden officials throughout the day.[209] State and federal wildlife officials entered the hunting camp in late afternoon.[210] The officials questioned the defendants and began a futile search of the area in an attempt to locate the ducks illegally taken.[211] One of the officials then told defendant Larson that he

202. *Id.* at 39. North Dakota Century Code § 12.1-32-11(1) provides:

> Unless the court otherwise orders, when a person serving a term of commitment imposed by a court of this state is committed for another offense or offenses, the shorter term or the shorter remaining term shall be merged in the other term. When a person on probation or parole for an offense committed in this state is sentenced for another offense or offenses, the period still to be served on probation or parole shall be merged in any new sentence of commitment or probation. A court merging sentences under this subsection shall forthwith furnish each of the other courts previously involved and the penal facilities in which the defendant is confined under sentence with authenticated copies of its sentence, which shall cite the sentences being merged. A court which imposed a sentence which is merged pursuant to this subsection shall modify such sentence in accordance with the effect of the merger.

Id. n.1 (quoting N.D. CENT. CODE § 12.1-32-11(1) (1976)).

203. 350 N.W.2d at 39.

204. *Id.*

205. *Id.*

206. 343 N.W.2d 361 (N.D. 1984).

207. State v. Larson, 343 N.W.2d 361, 362-63 (N.D. 1984). The court ruled that the evidence was obtained in violation of the defendants' fourth and fifth amendment rights. *Id.*

208. *Id.* at 366.

209. *Id.* at 362.

210. *Id.*

211. *Id.* The defendants had taken ducks in excess of the statutory limit. *Id.*

would give him "one chance and one chance only to show me [where the ducks are hidden] or we will bring down six wardens and four dogs."[212] Defendant Larson, not having received any *Miranda* warnings during the investigation, took the official to the locations where the ducks were hidden.[213] Defendants Larson and Johnsen were later arrested and charged with shooting ducks in excess of their limit.[214]

The state argued that a search warrant was unnecessary since the surveillance and search of the camp was permissible in light of the "open fields" doctrine.[215] The supreme court avoided a decision based on the open fields doctrine and concluded that the search was involuntary.[216] The supreme court considered the totality of the circumstances, including the official's threat that dogs and wardens would be brought in, the suggestion that the children in the hunting party should be taken far away, the size of the official doing the talking, and the fact that the wardens did not ask permission to search.[217] Moreover, the supreme court concluded that the defendant's fifth amendment privilege against self-incrimination was violated because no *Miranda* warnings were given and because the wardens should have known that their threats would elicit an incriminating response.[218]

DEBTORS AND CREDITORS

First Federal Savings and Loan Association v. Haley

In *First Federal Savings and Loan Association v. Haley*[219] the First Federal Savings and Loan Association of Grand Forks and Minot appealed from the judgment of the district court granting to First Federal foreclosure on certain real property, but providing that the six-month redemption period ran from the date of the sheriff's sale.[220]

The only issue raised on appeal was whether section 32-19.1-04.1 of the North Dakota Century Code, which changes the date on which the redemption period begins to run, may be applied to

212. *Id.*
213. *Id.*
214. *Id.* at 363.
215. *Id.* The "open fields" doctrine limits fourth amendment protection to a person's papers, houses, and effects. Hester v. United States, 265 U.S. 57 (1924).
216. 343 N.W.2d at 364-65.
217. *Id.*
218. *Id.* at 365-66.
219. 357 N.W.2d 492 (N.D. 1984).
220. First Fed. Sav. & Loan Ass'n v. Haley, 357 N.W.2d 492, 493 (N.D. 1984).

mortgages executed prior to the effective date of the statute, July 1, 1981.[221] Under pre-1981 law the period of redemption ran from the date of the sheriff's sale and since July 1, 1981 the period of redemption runs from the date of filing of the summons and complaint.[222]

Both the Constitution of the United States and the Constitution of the State of North Dakota prohibit the passage of any law which would impair the obligations of existing contacts.[223] The Supreme Court of the United States has also held that statutes which alter or modify the redemption period cannot be constitutionally applied to mortgages executed prior to the effective date of the statute.[224]

The court concluded that section 32-19.1-04.1 shortens the period of redemption and therefore cannot be constitutionally applied to mortgages executed prior to its effective date.[225] The judgment of the district court was affirmed.[226]

First Federal Savings and Loan Association v. Scherle

In *First Federal Savings and Loan Association v. Scherle*[227] First Federal Savings and Loan of Bismarck appealed from a summary judgment dismissing its complaint against the defendants, individual guarantors of a promissory note, for the balance of the note.[228] While this action was pending, First Federal obtained a judgment of foreclosure on the real estate mortgage executed by the same individual guarantors as additional security for the loan.[229] First Federal then purchased the mortgaged real estate at a sheriff's sale for the sum awarded in its prior judgment of foreclosure, together with accrued interest and costs.[230] The district court granted summary judgment for the defendants and dismissed First Federal's action, finding that First Federal had satisfied its judgment of foreclosure by purchasing the property for the judgment amount.[231] Thus, since the judgment of foreclosure was satisfied and the debt therefore paid, the district court concluded

221. *Id.*
222. *Id.* at 494.
223. *Id. See* U.S. CONST. art I, § 10; N.D. CONST. art. I, § 18.
224. 357 N.W.2d at 494 (citing Bradley v. Lightcap, 195 U.S. 1 (1904); Barnitz v. Beverly, 163 U.S. 118 (1896)).
225. 357 N.W.2d at 495.
226. *Id.*
227. 356 N.W.2d 894 (N.D. 1984).
228. First Fed. Sav. & Loan Ass'n v. Scherle, 356 N.W.2d 894, 895 (N.D. 1984).
229. *Id.*
230. *Id.*
231. *Id.* at 895-96.

that First Federal could not proceed against the defendants as guarantors.[232]

The issue raised on appeal was whether First Federal could maintain its action against the defendants as individual guarantors.[233] The supreme court affirmed the district court's ruling stating that First Federal had satisified its mortgage by purchasing the mortgaged property for the amount of the underlying debt, thus the debt was satisfied and, since one cannot guarantee payment on a nonexistent debt, the defendants' individual guaranties were extinguished.[234]

Finally, since First Federal contended that the case of *Bank of Kirkwood Plaza v. Mueller*[235] implicitly would allow its independent action against the defendants on the basis of their individual guaranties,[236] the court noted that a prior opinion is only controlling as to the points decided therein; any expression of opinion on a question not necessary for decision is merely dicta, and is not in any way controlling upon later decisions.[237]

Kessel v. Peterson

In *Kessel v. Peterson*[238] the Petersons moved to dismiss Kessel's appeal from a judgment entered against him prior to his filing bankruptcy.[239] The Petersons claimed that the automatic stay provisions of the Bankruptcy Code[240] prevent the state supreme court from acquiring jurisdiction of an appeal filed after the appellant has filed a bankruptcy petition.[241] The court stated that in order to determine whether a proceeding is stayed as an action *against* the debtor under the automatic stay provisions of the Bankruptcy Code, the critical focus should be on the debtor's status at the initial proceedings rather than on the label the debtor is given.[242]

The court reasoned that because the appeal resulted from a

232. *Id.* at 896.
233. *Id.*
234. *Id.*
235. 294 N.W.2d 640 (N.D. 1980).
236. 356 N.W.2d at 896.
237. *Id.* at 897.
238. 350 N.W.2d 603 (N.D. 1984).
239. Kessel v. Peterson, 350 N.W.2d 603, 604 (N.D. 1984).
240. 11 U.S.C. § 362(a) (1982).
241. 350 N.W.2d at 604. The Petersons had obtained a judgment on a counterclaim against Kessel rescinding certain land contracts and awarding the Petersons a money judgment. *Id.* The judgment was entered on September 29, 1983. *Id.* A writ of execution was issued October 13, 1983 on this judgment and was returned unsatisfied on November 3 because Kessel filed a petition in bankruptcy under Chapter 13 on October 31. *Id.* On November 7 Kessel filed a notice of appeal from the September 29 judgment. *Id.*
242. *Id.* at 605.

judgment on a counterclaim in which Kessel was essentially a defendant, the action was one against the debtor and the action is stayed unless the bankruptcy court grants relief.[243] Therefore, the court denied the Petersons' motion to dismiss and stayed Kessel's appeal pending further action by the bankruptcy court.[244]

DUTY TO WARN

Patch v. Sebelius

In *Patch v. Sebelius*[245] the court held that contractors have the authority to erect additional warning signs when necessary to protect the safety of the public.[246] Patch had appealed from a jury verdict finding that the highway contractors performing road work in the construction area where Patch was injured were not negligent.[247] Patch was injured when the vehicle he was driving collided with a semitrailer driven by Sebelius.[248] At trial Patch contended that the contractors had a duty to erect warning signs in addition to the warning signs required by the construction contract.[249] The defendant contractors claimed that under section 2A-3 of the Manual on Uniform Traffic Control Devices (MUTCD),[250] the North Dakota State Highway Department had exclusive authority respecting placement of warning signs on North Dakota highways.[251] The trial court held that, as a matter of law, the State Highway Department had exclusive control over the placement of warning signs and that the contractors' only duty was to place the signs that were specifically provided for in the plans and specifications.[252]

The controlling issue on appeal was whether the State Highway Department granted authority to the contractors to erect warning signs in addition to those specifically enumerated in the plans and specifications.[253] In holding that contractors have the authority to erect additional warning signs when necessary to

243. *Id.*
244. *Id.*
245. 349 N.W.2d 637 (N.D. 1984).
246. Patch v. Sebelius, 349 N.W.2d 637, 642 (N.D. 1984).
247. *Id.* at 638.
248. *Id.*
249. *Id.* at 639.
250. UNITED STATES DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROLS § 2A-3 (1971). The North Dakota State Highway Commissioner adopted the MUTCD as standards for state highways pursuant to statute. *See* N.D. CENT. CODE § 39-13-06 (1980).
251. 349 N.W.2d at 639.
252. *Id.* at 640.
253. *Id.*

protect the safety of the motoring public, the court reviewed the provisions in the MUTCD, the construction contracts, and case law in other states.[254] The court found that the MUTCD provides that construction contractors have authority to erect temporary signs at work sites to protect the public.[255] The contracts between the State Highway Department and the contractors provided that contractors were required to take any action reasonably necessary to protect the safety of the public while performing highway construction.[256] The court agreed with the conclusion of the Minnesota Supreme Court in *Ferguson v. Benson*[257] that a road contractor is in the best position to know of any dangerous conditions created by its activities and he is, therefore, required to warn unwary motorists of those dangerous conditions.[258] The North Dakota Supreme Court concluded that when hazardous conditions occur, the contractor is in the best position to know of the danger and to take appropriate steps to warn the traveling public.[259]

EQUAL PROTECTION

State v. Fischer

In *State v. Fischer*[260] the state appealed from an order of the County Court of Cass County granting defendant's motion to dismiss the charge of issuing a check without sufficient funds.[261] The case raised two issues: whether section 6-08-16 of the North Dakota Century Code[262] violates the equal protection clause of the United State Constitution and, if it does, whether the infirm language could be severed from the statute.[263]

The supreme court of North Dakota affirmed the trial court's finding that the relevant language of section 6-08-16 of the North Dakota Century Code is substantively identical to the language of

254. *Id.* at 640-41.
255. *Id.* at 639.
256. *Id.* at 640.
257. 309 Minn. 160, 244 N.W.2d 116 (1976).
258. 349 N.W.2d at 641 (citing Ferguson v. Benson, 309 Minn. 160, ____, 244 N.W.2d 116, 120 (1976)).
259. 349 N.W.2d at 641.
260. 349 N.W.2d 16 (N.D. 1984).
261. State v. Fischer, 349 N.W.2d 16, 17 (N.D. 1984).
262. *Id.* Section 6-08-16 of the North Dakota Century Code provides that it is a class B misdemeanor to "make, draw, utter, or deliver" a check if there are not sufficient funds to pay the check in full upon its presentation. N.D. CENT. CODE § 6-08-16(1) (Supp. 1983). The portion of the section at issue in this case states that "[p]ayment to holder of the face amount of the instrument, plus any collection fees or costs, not exceeding the additional sum of ten dollars, shall constitute a defense to a criminal charge brought hereunder if paid within ten days from receipt of this notice of dishonor." N.D. CENT. CODE § 6-08-16(4) (Supp. 1983).

section 6-08-16.2, which was declared unconstitutional in *State v. Carpenter*.[264] Thus the court held that section 6-08-16 created a classification based on wealth in violation of the equal protection clause and is, therefore, unconstitutional.[265]

The supreme court found that removing the infirm language of the statute served to foster the harsh result of the strict liability element of the statute.[266] The court could not conclude that the legislature intended the statute to stand without the affirmative defense language, and thus held that section 6-08-16 of the North Dakota Century Code is unconstitutional and invalid in its entirety.[267] The supreme court thus affirmed the trial court's order dismissing the charges against Fischer.[268]

ESTATES

In re Estate of Knudsen

In *In re Estate of Knudsen*[269] the supreme court held that life insurance benefits and joint tenancy arrangements are "transfers" for the purposes of the omitted spouse statute, which entitles an omitted spouse to an intestate share unless the omission was intentional or the testator provided for the spouse by transfers outside the will and it is shown the transfers were intended to be in lieu of a testamentary provision.[270] Susan Knudsen was married to Jerry Knudsen in 1975; Jerry Knudsen's will was executed in 1962 and was never changed or supplemented.[271] Susan was the beneficiary of several life insurance policies, however, and was a joint owner of land with Jerry.[272]

In its analysis the court noted that the word "transfer" is not defined in title 30.1 (Uniform Probate Code) of the North Dakota Century Code.[273] Further, the court noted that the editorial board comment to the omitted spouse statute does not mention that life insurance benefits and joint tenancy properties constitute "transfers."[274] The court found, however, that the editorial board

263. 349 N.W.2d at 18.
264. *Id. See* State v. Carpenter, 301 N.W.2d 106, 110 (N.D. 1980).
265. 349 N.W.2d at 18.
266. *Id.*
267. *Id.*
268. *Id.*
269. 342 N.W.2d 387 (N.D. 1984).
270. *In re* Estate of Knudsen, 342 N.W.2d 387, 391 (N.D. 1984). *See* N.D. CENT. CODE § 30.1-06-01 (1976).
271. 342 N.W.2d at 388.
272. *Id.* at 388-89.
273. *Id.* at 390.
274. *Id.*

comments to the augmented estate statute and the pretermitted children statute speak of transfers such as life insurance and joint accounts.[275] The court also looked at the Uniform Probate Code Practice Manual, which refers to transfers outside the will, such as life insurance or joint tenancy arrangements.[276] Finally, the court followed the Arizona and New Mexico courts which recognize that life insurance and joint tenancy property can be included as "transfers" within the omitted spouse statute.[277] The court also found that the jury could determine from the amount of the transfers alone whether the decedent intended the transfers to be in lieu of a testamentary provision.[278]

FORFEITURE

State v. Ronngren

In *State v. Ronngren*[279] the supreme court adopted the guidelines from Illinois cases in applying a forfeiture provision in the North Dakota controlled substances statute.[280] James and Judy Ronngren were convicted of possession of a controlled substance with intent to deliver.[281] During a search of their home the State seized $1,835.[282] After their conviction the Ronngrens filed an application to apply the confiscated monies to attorney fees.[283] The trial court ordered the return of the money to the Ronngrens and the state appealed.[284]

The supreme court noted that the North Dakota controlled substances statute, similar to the Illinois statute, identifies money as an item subject to forfeiture, whereas the Uniform Controlled Substances Act does not.[285] The court then adopted the following Illinois guidelines for handling proceedings involving forfeitures: 1) forfeiture proceedings are in rem and are considered civil in nature; 2) the State must prove its right to the property by a preponderance of evidence, not beyond a reasonable doubt; and, 3) after the State has demonstrated that the money is connected to the offense (prima

275. *Id.* See N.D. CENT. CODE § 30.1-05-02 (Supp. 1983) for the augmented estate statute, and N.D. CENT. CODE § 30.1-06-02 (1976) for the pretermitted children statute.

276. 342 N.W.2d at 390-91. *See* 1 UNIFORM PROBATE CODE PRACTICE MANUAL 115 (2d ed. 1977).

277. 342 N.W.2d at 391. *See In re* Estate of Beaman, 119 Ariz. 614, 583 P.2d 270 (Ariz. Ct. App. 1978) and *In re* Estate of Taggart, 95 N.M. 117, 619 P.2d 562 (N.M. Ct. App. 1980).

278. 342 N.W.2d at 392.

279. 356 N.W.2d 903 (N.D. 1984).

280. State v. Ronngren, 356 N.W.2d 903, 906 (N.D. 1984). *See* N.D. CENT. CODE ch. 19-03.1 (1981).

281. 356 N.W.2d at 904. The Ronngrens were in violation of N.D. CENT. CODE § 19-03.1-23(1) (Supp. 1983).

282. 356 N.W.2d at 904.

283. *Id.*

284. *Id.*

285. *Id.* at 905-06.

facie), the defendant has the burden of showing that portion of the money seized was not related to the violation.[286] In this instance, the court ruled that the State had proved a prima facie case that the money was profits from drug sales, and that the Ronngrens had failed to show what portion of the money seized was from an insurance settlement.[287]

JURISDICTION

In re Otter Tail Power Co.

In *In re Otter Tail Power Co.*[288] the Public Service Commission (PSC) and Baker Electric Cooperative appealed from the district court judgment holding that the PSC did not have jurisdiction to act over the territorial service areas of competing utilities when the service point is within an Indian reservation.[289] Otter Tail Power contended that the issue was not one of jurisdiction, but rather was one concerned with the impairment of rights granted by federal law and interference with federal regulation of land use contrary to the supremacy clause.[290]

The North Dakota Supreme Court first examined the posture of the case to determine if the supremacy question could be raised for the first time at a district court level on an appeal from a decision of the PSC.[291] The court refered to a similar confrontation in *Johnson v. Elkin,*[292] where a divided court concluded that under the Administrative Agencies Practice Act (Ch. 28-32, N.D. Cent. Code) constitutional issues can be raised for the first time at the district court level "under certain circumstances."[293] Thus the court concluded that although a collateral proceeding would have been more appropriate, the federal supremacy question could properly be raised for the first time at the district court level on appeal from the PSC decision.[294]

286. *Id.* at 906.
287. *Id.*
288. 354 N.W.2d 701 (N.D. 1984).
289. *In re* Otter Tail Power Co., 354 N.W.2d 701, 703 (N.D. 1984).
290. *Id.* Article VI of the U.S. Constitution provides in part:

> This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. CONST., art. VI (quoted in *In re* Otter Tail Power Co., 354 N.W.2d at 703 n.5).
291. 354 N.W.2d at 703.
292. 263 N.W.2d 123 (N.D. 1978).
293. 354 N.W.2d at 704.
294. *Id.*

The court next examined the issue of whether the PSC was barred by the supremacy clause from exercising jurisdiction.[295] Referring to *Northern States Power Co. v. Hagen,*[296] Justice Sand, for a unanimous court, wrote:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., art. VI. The criterion for determining whether or not there is such a conflict is whether the state's law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, ...[297]

After noting that the objective of the Bureau of Indian Affairs was to contract for energy at the new school with the supplier selected pursuant to PSC requirements, it cannot be said that the PSC action provided an "obstacle" to the federal purpose, thus the judgment of the district court was reversed, and the case was remanded for entry of judgment affirming the determination of the PSC.[298] The court also commented on the fact that this case did not infringe upon the right of tribal self-government.[299]

MUNICIPAL CORPORATIONS

Mini Mart, Inc. v. City of Minot

In *Mini Mart, Inc. v. City of Minot*[300] the city of Minot appealed from a judgment entered by the District Court of Ward County granting a peremptory writ of mandamus ordering the city to issue a retail beer license to Mini Mart, Inc.[301] The North Dakota Supreme Court affirmed the lower court.[302]

The city denied Mini Mart's application on the basis of unwritten criteria, but urged the trial court to take judicial notice of the demography of the area, the geography, and the public mood regarding drunk driving in determining whether the city council abused its discretion.[303] The court will not reverse a trial court's

295. *Id.* at 705.
296. 314 N.W.2d 32 (N.D. 1981).
297. 354 N.W.2d at 705.
298. *Id.* at 705-06.
299. *Id.* at 705.
300. 347 N.W.2d 131 (N.D. 1984).
301. Mini Mart, Inc. v. City of Minot, 347 N.W.2d 131, 133 (N.D. 1984).
302. *Id.*
303. *Id.*

issuance or denial of a writ of mandamus unless, as a matter of law, such writ should not be issued or there is a finding that the trial court abused its discretion.[304] The court upheld the trial court's decision that Mini Mart was not granted a license because the Minot City Council had gone beyond the bounds set by the Minot Code of Ordinances,[305] and not on the trial court's conclusion that the city had preserved an inadequate record of proceedings.[306]

The city council also passed an ordinance prohibiting a business from selling both liquor and gasoline.[307] The court also concluded that any attempt by the city of Minot to amend its existing ordinances by resolution was ineffective.[308] The court also held that, when exercising its discretion, the city must use written criteria which adequately inform applicants of the city's standards and policies and guide the licensing authority in arriving at its decision.[309]

The court indicated that fundamental fairness was the guide in determining whether a city had legitimate guidelines.[310] The supreme court upheld the trial court's ruling that the city could not rely on unwritten and unspecified criteria in denying Mini Mart's application.[311] Finally, the North Dakota Supreme Court affirmed the lower court's holding that section 5-28 (e) of the Minot Code of Ordinances[312] must be read narrowly and therefore could not be used by the city to deny Mini Mart's application.[313]

OIL AND GAS

Olson v. Schwartz

In *Olson v. Schwartz*[314] lessees of oil and gas leaseholds appealed district court judgments decreeing cancellation of portions of the

304. *Id.* at 135 (citing Eckre v. Public Serv. Comm'n, 247 N.W.2d 656, 665-66. (N.D. 1976)).
305. 347 N.W.2d at 137.
306. *Id.*
307. *Id.* at 135.
308. *Id.* at 138.
309. *Id.* at 141.
310. *Id.*
311. *Id.*
312. *Id.* Section 5-28(e) of the Minot Code of Ordinances provides:

> Upon the receipt by the city council of the report, or reports, the city council shall determine whether or not in its opinion the building proposed to be used is suitable and proper for use as an alcoholic beverage licensed place of business. In the event that the city council shall feel that the structure is not sufficient for the general welfare and safety of the general public, then such application shall be denied. Upon such denial, the city auditor shall notify the applicant of such denial.

MINOT, N.D., CODE OF ORDINANCES § 5-28(e) (1983).
313. 347 N.W.2d at 141.
314. 345 N.W.2d 33 (N.D. 1984).

leaseholds on the theory of abandonment.[315] The appellants, Lund and Prosper Energy Corporation, raised two issues: whether the trial court erred in finding that there had been an abandonment of the undeveloped portions of the leaseholds,[316] and whether the trial court erred in failing to rule and order judgment in favor of lessees on the plaintiffs' claims of breach of implied covenents.[317]

The lessors argued that where there has been a long failure to explore or drill on available portions of an oil and gas lease, and where the lessees have no present intention of developing those portions of the leasehold, there is a legal presumption that the lessees have abandoned those portions even though no physical relinquishment has been shown.[318] The lessees argued that the leases are maintained over the entire acreage of their respective leaseholds by production from stripper wells.[319] Additionally, the lessees contended that cancellation of a portion of a leasehold under such circumstances could only be granted upon proof of breach of implied covenants, following notice and demand.[320]

The North Dakota Supreme Court found the evidence insufficient to sustain a finding of abandonment since the facts before the court established neither an intention to abandon nor a physical relinquishment.[321] The court stated that the mere non-use of a portion of a leasehold which is held by production is not sufficient to establish intent to abandon the lease.[322] The court also stated that in North Dakota, a lessor may be entitled to relief under the theory of breach of implied covenant of reasonable development where the particular facts of the case disclose that the particular lessee has not developed a particular lease in conformity with the reasonably prudent operator standard.[323] Although the court noted that each lease did carry an implied covenant of reasonable development, the facts before it were insufficient to support a finding of a breach of such a covenant.[324] The court went on to state

315. Olson v. Schwartz, 345 N.W.2d 33, 34 (N.D. 1984). The appeals of Vern Lund and Prosper Energy Corporation were consolidated for argument. *Id.* at 35. The appeals rose from two leases: the Olson lease and the Larsen lease. *Id.* at 34-35.

316. *Id.* at 35.

317. *Id.* at 36.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 38.

322. *Id.* Throughout its discussion of the abandonment doctrine the court relied heavily upon Hermon Hansen Oil Syndicate v. Bentz, 77 N.D. 20, 40 N.W.2d 304 (1949). *See* 345 N.W.2d at 36-38, 40.

323. 345 N.W.2d at 39. In noting factors to be considered in applying the prudent operator standard, the court cited Sanders v. Birmingham, 214 Kan. 769, 522 P.2d 959, 966 (1974). 345 N.W.2d at 39-40. The court also added other factors to be considered to this list. *See* 345 N.W.2d at 40.

324. 345 N.W.2d at 40.

that although a breach of the implied covenant of reasonable development may result in a forfeiture of the lease, before a lessor is entitled to that relief he must show that he has made demand of the lessee to comply with the implied covenant and has allowed a reasonable time for such compliance.[325] Accordingly, the court reversed the district court's cancellation of portions of lessee's leases.[326]

PARENT AND CHILD

Sexton v. J.E.H.

In *Sexton v. J.E.H.*[327] respondent appealed from a juvenile court judgment terminating her parental rights to two children.[328] The North Dakota Supreme Court affirmed the juvenile court's ruling.[329]

Both of respondent's children were placed in a foster home after one of the children received an unexplained head injury.[330] Approximately eight months later the oldest son was returned to respondent.[331] The son was again removed from his mother's care before respondent's parental rights were terminated.[332]

The court set forth three factors which the state must establish by "clear and convincing evidence" before parental rights could be terminated: "[T]hat the child is a 'deprived child'; that the conditions and causes of the deprivation are likely to continue and will not be remedied; and that by reason of the continuous or irremedial conditions and causes, the child is suffering or probably will suffer serious physical [sic] mental, moral, or emotional harm."[333]

The court held that all elements of the test were met.[334] The fact that the younger child did not yet display the same symptoms as the older child did not preclude the lower court from finding that the older child was deprived.[335]

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325. *Id.* at 40-41.
326. *Id.* at 41.
327. 355 N.W.2d 828 (N.D. 1984).
328. Sexton v. J.E.H., 355 N.W.2d 828, 829 (N.D. 1984).
329. *Id.* at 832.
330. *Id.* at 829.
331. *Id.*
332. *Id.*
333. *Id.* at 830 (quoting McBeth v. J.J.H., 343 N.W.2d 355, 358 (N.D. 1984)).
334. 355 N.W.2d at 832.
335. *Id.*

PRODUCTS LIABILITY

Anderson v. Teamsters Local 116 Building Club

In *"Anderson v. Teamsters Local 116 Building Club*[336] defendant Hysan Corporation, manufacturer of a dance wax sprinkled on the floor of Teamsters Local 116 Building Club, appealed from a district court order denying their motion for a judgment notwithstanding the verdict or, alternatively, for a new trial.[337] The district court found Hysan Corporation fifty-five percent negligent for damages incurred by the plaintiff when she slipped, fell, and fractured her wrist.[338] The North Dakota Supreme Court affirmed the lower court's decision.[339]

On appeal, Hysan argued that the special jury verdict finding the product was not defective and at the same time finding Hysan negligent was inconsistent and irreconcilable as a matter of law.[340] The supreme court concluded that the special jury verdict was not inconsistent and irreconcilable as a matter of law in that Hysan could be held liable even if the product was not defective and unreasonably dangerous if it failed to give adequate instructions, directions or warnings.[341]

The supreme court also held that the trial cout did not err in refusing Hysan's requested jury instructions regarding assumption of risk.[342] In addition, the supreme court held that the trial court properly denied Hysan's request that the jury be instructed that plaintiff's damages would not be taxable as income.[343] Finally, a casual reference to insurance which left the jury in doubt as to who had the insurance was held to be harmless.[344]

Hagert v. Hatton Commodities, Inc.

In *Hagert v. Hatton Commodities, Inc.*[345] Powell, a third party defendant, appealed from a jury verdict for the plaintiff.[346] The

336. 347 N.W.2d 309 (N.D. 1984).
337. Anderson v. Teamsters Local 116 Bldg. Club, 347 N.W.2d 309, 310 (N.D. 1984).
338. *Id.* The jury found the plaintiff forty-five percent negligent. *Id.* The jury further found no negligence against defendant Teamsters Local 116 Building Club. *Id.*
339. *Id.* at 315.
340. *Id.* at 311.
341. *Id.* The court stated that the jury could have considered the question of Hysan's negligence to mean: "Did Hysan fail to provide appropriate directions and instructions and did Hysan fail to warn?" *Id.*
342. *Id.* at 314. Several of the contributory negligence instructions incorporated the assumption of risk doctrine. *Id.*
343. *Id.* at 314-15.
344. *Id.* at 315.
345. 350 N.W.2d 591 (N.D. 1984).
346. Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 593 (N.D.1984).

plaintiff, Hagert Farms, purchased certified pinto bean seed from Hatton Commodities.[347] When the plaintiff discovered that the bean plants were infected with a disease caused by contaminated seed, the plaintiff had to destroy the plants and reseed.[348] Plaintiff sued the seller, Hatton Commodities, alleging negligence, breach of warranty, and strict liability in tort.[349] Plaintiff demanded damages for additional expenses incurred in reseeding and loss of profits due to reduced yield.[350] Hatton Commodities asserted a third-party claim against the supplier, Greeley, and the processor, Powell.[351] The case was submitted to the jury on the theories of breach of warranty and strict liability.[352] As presented in the special verdict form, the jury was entitled to award damages for loss of profits under a strict liability claim.[353] Powell argued on appeal that strict liability in tort was not applicable to a case that involved a claim for recovery of lost profits in a commercial transaction.[354] The supreme court held that Powell was entitled to a new trial because the verdict form misstated the law by allowing the recovery of lost profits under strict liability in tort.[355]

On appeal the court reviewed North Dakota products liability cases and found that no prior case involved loss of profits.[356] Thus, this case offered the court its first opportunity to discuss the potential conflict between strict liability in tort, section 402A of the Restatement (Second) of Torts, and contract remedies under the Uniform Commerical Code.[357] Acknowledging that other jurisdictions addressing the issue had reached opposite results,[358] the court determined that the better view was that the doctrine of strict liability in tort had not superseded the commerical remedies for breach of warranty in chapter 41-02 of the North Dakota Century Code.[359] Consequently, the court held that economic loss is recoverable under breach of warranty but is not recoverable

347. *Id.*

348. *Id.* The bean plants were infected with "halo blight," which is caused by contaminated seed. *Id.*

349. *Id.* The breach of warranty claim was based on the implied warranty provisions in sections 2-314 and 2-315 of the Uniform Commercial Code. *Id.* at 595. *See* N.D. CENT. CODE §§ 41-02-31, -32 (1983). The product liability claim was based on strict liability in tort. 350 N.W.2d at 593. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

350. 350 N.W.2d at 593.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 595.

356. *Id.* at 593-94. Powell contended that lost profits are ordinarily recoverable only under a contract theory. *Id.* at 594.

357. *Id.* at 594. The court held that lost profits are recoverable under a theory of breach of implied warranty. *Id.* at 595.

358. *Id.* at 595.

359. *Id.*

under strict liability in tort.[360] The court concluded that when a case involves alternative theories of breach of warranty and strict liability in tort, a special verdict form should be used that will specifically indicate upon what theory of recovery an award is made.[361]

PROPERTY DIVISION UPON DIVORCE

Bullock v. Bullock

In *Bullock v. Bullock*[362] the supreme court affirmed the trial court's apportionment of future military retirement pay as part of a divorce judgment.[363] In so doing the court disavowed its earlier decision in *Rust v. Rust*[364] that military retirement pay was not a divisible asset for purposes of property division on divorce.[365]

The court noted that *Rust* was based on *McCarty v. McCarty,*[366] in which the United States Supreme Court held "that federal law precludes a state court from dividing military nondisability retirement pay pursuant to state community property law."[367] The issue in *Bullock* was what effect Congress' enactment of the Uniformed Services Former Spouses' Protection Act[368] had on the *McCarty* decision.[369]

The court examined the legislative history of the Uniformed Former Spouses' Protection Act and concluded that Congress intended to overrule *McCarty.*[370] Since *Rust* was based solely on *McCarty,* it is no longer controlling in North Dakota on the issue of military retirement pay.[371] In view of Congress' intent to effectively overrule *McCarty,* the court ruled that the trial court's division of the military retirement pay was not clearly erroneous.[372]

Seablom v. Seablom

In *Seablom v. Seablom*[373] Carole Seablom appealed from a

360. *Id.* The court adopted the rule of strict liability in tort in 1974. *See* Johnson v. American Motors Corp., 255 N.W.2d 57, 58 (N.D. 1974).

361. 350 N.W.2d at 594. *See, e.g.,* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Clark v. International Harvestor Co., 99 Idaho 326, 581 P.2d 784 (1978).

362. 354 N.W.2d 904, 905 (N.D. 1984).

363. Bullock v. Bullock, 354 N.W.2d 904, 905 (N.D. 1984).

364. 321 N.W.2d 504 (N.D. 1982).

365. 354 N.W.2d at 908.

366. 453 U.S. 210 (1981).

367. 354 N.W.2d at 906-07.

368. Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408 (1982)).

369. 354 N.W.2d at 906.

370. *Id.* at 907.

371. *Id.* at 908.

372. *Id.*

373. 348 N.W.2d 920 (N.D. 1984).

district court order denying the remedy of civil contempt for her ex-husband's failure to comply with payment provisions of their divorce decree.[374] The provision Carole had attempted to enforce by civil contempt proceedings obligated her ex-husband to pay $14,400.00 in thirty-six monthly installments of $400.00 per month "as and for alimony."[375] This provision was included in a proposed settlement presented by the parties to the district court in the divorce action and incorporated by the court into its judgment.[376] The same judge, in later denying the civil contempt remedy, ruled that the payments described as alimony were in fact in the nature of a property settlement.[377] On appeal, the supreme court addressed the issues of whether the payments constituted a property division and whether the court could enforce the decree by using its civil contempt powers.[378]

The supreme court agreed with the trial court's characterization of the monthly payments as a property divison.[379] Justice VandeWalle concluded that the term "alimony" is patently ambiguous in that it can refer to either property distribution or spousal support.[380] The court noted that the ambiguity was evident by the fact that Carole's attorney had referred to the payment as a property settlement throughout the divorce proceeding.[381] More importantly, however, was the fact that the payments did not terminate at Carole's death.[382] The court concluded that the purpose of alimony was either to rehabilitate spouses by aiding them in acquiring new skills or permanently maintain parties incapable of being rehabilitated.[383] Since neither purpose could be effectuated after the obligee's death, the court viewed the payment at issue as more properly characterized as a property settlement.[384]

With respect to the civil contempt issue, the court reiterated its earlier determination that "contempt proceedings would not lie when a party sought to enforce a judgment for the distribution of

374. Seablom v. Seablom, 348 N.W.2d 920, 922 (N.D. 1984). *See* N.D. CENT. CODE § 27-10-03 (3)(1974)(civil contempt available as punishment for nonpayment of money, pursuant to court order in case where, by law, sum cannot be collected by execution).

375. 348 N.W.2d at 922. The provision stated that payments of $400 per month would not terminate on the death or remarriage of either party. *Id.*

376. *Id.*

377. *Id.* at 922, 925. When Carole attempted to collect the unpaid balance of $25,000 by execution, John Seablom and his new wife filed a joint bankruptcy petition. *Id.* at 922-23.

378. *Id.* at 923.

379. *Id.* at 924-25.

380. *Id.* at 924. Carole's execution to enforce the $25,000 debt was returned unsatisfied because John declared his property exempt. *Id.* at 922; *see* N.D. CENT. CODE ch. 28-22 (1974 and Supp. 1983)(exemptions from attachment, execution and any other final process). He then filed a Chapter 7 bankruptcy petition. 348 N.W.2d at 923. *See* 11 U.S.C. §§ 701-66 (1982).

381. 348 N.W.2d at 923.

382. *Id.* at 924.

383. *Id.*

384. *Id.*

property.''[385] The court determined that Carole's remedy was to execute on the judgment.[386] Even though her writ of execution had been returned unsatisifed, the court noted that she might later be successful, since a judgment is valid for ten years.[387]

Finally, the court addressed Carole's argument that a divorce creditor should not be permitted to claim statutory exemptions from process.[388] The court recognized the ''obvious injustice'' in this case; however, finding no statute precluding application of the exemption statutes to divorce judgments, it concluded that only the legislature could act to mitigate the harm.[389]

REAL PROPERTY

Folmer v. State

In *Folmer v. State*[390] the court held that the confiscatory price defense, as codified in sections 28-29-04, 28-29-05 and 28-29-06 of the North Dakota Century Code, applies to real property mortgage foreclosures and is sufficient to enjoin a foreclosure by advertisement.[391] The Folmers defaulted on their farm mortgage.[392] The mortgage contained a provision entitling the mortgagee, the State of North Dakota, to foreclose by advertisement.[393] When the mortgagee served a notice of intention to foreclose and advertised that the farm would be sold at a sheriff's sale, the Folmers sought to enjoin the foreclosure by advertisement, asserting the confiscatory price defense to delay foreclosure proceedings during periods of economic hardship.[394] The district court refused to grant the injunction, ruling that the confiscatory price defense does not apply to a foreclosure of a real property mortgage and that the defense does not apply to a foreclosure by advertisement.[395]

On the issue whether the confiscatory price defense statutes apply to a foreclosure by advertisement, the court first held that the

385. *Id.* at 925.
386. *Id.* (citing Dvorak v. Dvorak, 329 N.W.2d 868 (N.D. 1983)).
387. 348 N.W.2d at 925. *See* N.D. CENT. CODE § 28-21-01 (1974).
388. 348 N.W.2d at 925.
389. *Id.*
390. 346 N.W.2d 731 (N.D. 1984).
391. Folmer v. State, 346 N.W.2d 731, 733-34 (N.D. 1984). *See* N.D. CENT. CODE §§ 28-29-04 to -06 (1974).
392. 346 N.W.2d at 732.
393. *Id.*
394. *Id. See* N.D. CENT. CODE § 35-22-04 (1980) (procedure for enjoining foreclosures by advertisement).
395. 346 N.W.2d at 732.

defense applies to real estate mortgage foreclosures and is not limited to the sale of agricultural products.[396] The court stated that by the terms of section 28-29-04, the words "in any cause" would clearly include real estate mortgage foreclosures.[397]

The court next stated that in deciding whether to enjoin a foreclosure by advertisement, a court must determine if the mortgagor would have a counterclaim or defense that could be pleaded in a subsequent action to foreclose.[398] The court held that any set of facts that could be pleaded as a defense or counterclaim in an action to foreclose may provide a sufficient basis for an injunction of an action to foreclose by advertisement.[399]

On the issue of whether the confiscatory price defense constitutes the statutory requirement of a legal counterclaim or defense against the collection of all or part of the amount due on a mortgage, the supreme court rejected the state's argument that the requirement is met only if the counterclaim or defense would eliminate the debt or reduce the amount due on the mortgage.[400] Instead, the court ruled that the statute is remedial and is to be liberally construed to protect the interests of the debtor-mortgagor.[401] The court held that the confiscatory price defense is a legal counterclaim or other valid defense that provides a sufficient basis to enjoin a foreclosure by advertisement, thus permitting the matter to be heard as a foreclosure by action.[402]

Finally, the state argued that even if the confiscatory price defense is sufficient to enjoin a foreclosure by advertisement, a court, in its discretion, may deny the injunction.[403] The supreme court held that the court is to exercise discretion only to determine if the statutory defense or counterclaim is raised in the affidavit.[404] The court concluded that if an affidavit raises a defense or counterclaim the court may not refuse to enjoin the foreclosure by advertisement.[405]

Sibert v. Kubas

In *Sibert v. Kubas*[406] plaintiff brought a quiet title action to

396. *Id.* at 733.
397. *Id.*
398. *Id.* at 734.
399. *Id.* (citing Scott v. District Court of Fifth Judicial Dist., 15 N.D. 259, 107 N.W.2d 61 (1906)).
400. 346 N.W.2d at 734.
401. *Id.* (citing Scott v. District Court of Fifth Judicial Dist., 15 N.D. 259, 107 N.W.2d 61 (1906)).
402. 346 N.W.2d at 735.
403. *Id.*
404. *Id.*
405. *Id.*
406. 357 N.W.2d 495 (N.D. 1984).

determine ownership of a one-half mineral interest in the subject property. The district court entered judgment for the defendant grantees, and plaintiff appealed.[407]

In order to decide this case, the court first construed the legal effect of a 1970 deed in which Mary Stuss conveyed the subject property to David and Patricia Kubas by a warranty deed containing the following reservation: "excepting and reserving unto the grantor one-half (½) of all oil, gas and all other minerals . . . ."[408] Since it was undisputed that at the time of the conveyance Mary owned only one-half of the minerals, it was impossible for her to both convey and reserve one-half of the minerals.[409] The result can be explained by the *Duhig* doctrine[410] which the court adopted in *Kadrmas v. Sauvageau.*[411] Patricia and David Kubas, as grantees, received Mary's one-half mineral interest, and Mary was estopped from asserting title to that interest under the reservation clause because "the warranty obligation is superior to the . . . [grantors'] reservation rights."[412]

The court previously held in *Gilbertson v. Charlson*[413] that grantees who had constructive notice of a five percent mineral interest in the State of North Dakota and actual notice of a 31⅔ percent mineral interest owned by the grantees, could not claim that the deed conveyed to them the interest that the grantor reserved.[414] Since "[t]he grantees outstanding fractional mineral ownership warranted the nonapplication of the *Duhig* doctrine and a refusal to estop the grantors from asserting title to the reserved interest . . . to their cotenant grantee who had actual and constructive notice of the outstanding mineral ownership."[415]

In the present case the court distinguished *Gilbertson* and limited its application to situations involving facts similar to those encountered in *Gilbertson.*[416] Therefore, the *Gilbertson* exception to the *Duhig* doctrine does not apply to a *Sibert* fact situation where the grantee is without an outstanding mineral interest in the conveyed

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407. Sibert v. Kubas, 357 N.W.2d 495, 495 (N.D. 1984).

408. *Id.* at 496. It is undisputed that the State of North Dakota owns a one-half interest in the minerals by virtue of a statutory reservation. *Id.*

409. *Id.* at 497.

410. *Id.* at 496 n.1. The doctrine is that a grantor who, by a warranty deed, purports to convey a fractional mineral interest is estopped from asserting title to a reserved fractional mineral interest in contradiction to the interest purportedly conveyed. Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878 (1940).

411. 188 N.W.2d 753 (N.D. 1971).

412. 357 N.W.2d at 497. For a rationale of this result, see 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 311, at 580.10 (1983).

413. 301 N.W.2d 144 (N.D. 1981).

414. *Id.*

415. 327 N.W.2d at 498 (citing Gilbertson v. Charlson, 301 N.W.2d 144, 148 (N.D. 1981)).

416. 357 N.W.2d at 497-98.

property.[417] In accordance with this opinion the supreme court affirmed the judgment of the district court quieting title to the surface and one-half of the minerals in Kubas.[418]

Wehner v. Schroeder

In *Wehner v. Schroeder*[419] Christ and Helen Wehner brought an action to reform a warranty deed conveying land to Frank and Barbara Schroeder.[420] No mineral reservation was included in the deed; however, the contract for deed contained language reserving fifty percent of all the oil, gas, and mineral rights to the Schroeders.[421] Subsequently, the Schroeders conveyed the land to Eva and John Tormaschy through a warranty deed which contained no mineral reservation.[422] Eva and John conveyed the land to their son and his wife, Albert and Genevieve Tormaschy.[423] In the reformation action the Wehners claimed that the language in the original contract for deed was a mistake and that the intent of the parties was to allow the Wehners to retain fifty percent of the mineral rights in the land conveyed.[424] The Wehners also contended that the mineral reservation was supposed to be made an express term of the warranty deed but was mistakenly omitted.[425]

The matter had been before the North Dakota Supreme Court the year before when the Wehners appealed the trial court's finding that the Wehners were barred from recovery by the statute of limitations and that the deed could not be reformed because reformation would prejudice Albert and Genevieve's rights as good faith purchasers.[426] In this earlier appeal the supreme court held that Albert and Genevieve had constructive notice of a possible claim by the Wehners because the deed and the contract for deed were recorded.[427] Further, the court determined that the statute of limitations did not bar the Wehners' action.[428] The supreme court remanded for a determination of whether the suit was barred by

417. *Id.* at 498.
418. *Id.* at 499.
419. 354 N.W.2d 674 (N.D. 1984).
420. Wehner v. Schroeder, 354 N.W.2d 674, 675 (N.D. 1984).
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.* at 675-76.
425. *Id.* at 676.
426. *Id.*
427. *Id.* (citing Wehner v. Schroeder, 335 N.W.2d 563, 565 (N.D. 1983)).
428. 335 N.W.2d at 567. The court held the statute of limitations did not bar suit because the action for reformation accrued not at the time of conveyance, but at the time when the mistake was or should have been known to the party bringing suit. *Id.*

laches or estoppel and whether the deed could be reformed on the basis of mutual mistake.[429]

On remand the trial court determined that the Wehners' action was not barred by laches.[430] Moreover, the trial court ordered the deed reformed on the grounds of mutual mistake and quieted title in the Wehners for fifty percent of the mineral rights.[431] The Tormaschys appealed from these findings and the North Dakota Supreme Court affirmed.[432]

In discussing the doctrine of laches the North Dakota Supreme Court remarked that laches does not arise from a lapse in time alone.[433] Instead, the delay must have caused the party asserting laches to change his position to a point where he cannot be restored to his former state.[434] Additionally, a party must have been aware of his rights before laches can successfully be invoked against him.[435] In reviewing the facts the court agreed with the trial court that because the Wehners were not aware of the omission and mistake until 1978, and nothing prejudicial to the defendants' rights occurred between 1978 and the commencement of the suit, laches did not bar the Wehners' action.[436]

The Tormaschys also contended that the Wehners should be estopped from asserting title in the fifty percent mineral interests.[437] The court dismissed this contention and noted that a party relying on estoppel must lack all knowledge of the true state of the title and have no means of acquiring that knowledge.[438] In this instance, because the contract and deed were properly recorded, the Tormaschys had a means of acquiring knowledge concerning the true state of the title.[439]

In regard to the Wehners' claim for reformation of the deed under the doctrine of mutual mistake, the court reviewed the evidence and found that it adequately supported the trial court's finding that the written deed did not accurately state what the parties intended to convey.[440] The Tormaschys asserted that because the Wehners were negligent in failing to read the deed before signing it, they should not be allowed to reform the

429. *Id.*
430. 354 N.W.2d at 676.
431. *Id.*
432. *Id.* at 676, 679.
433. *Id.* at 676-77 (citing Simons v. Tancre, 321 N.W.2d 495, 500 (N.D. 1982)).
434. *Id.* (citing Burlington Northern, Inc. v. Hall, 322 N.W.2d 233, 242 (N.D. 1982)).
435. 354 N.W.2d at 676-77.
436. *Id.* at 677.
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.*

agreement.[441] The supreme court agreed with the trial court that the Wehners' failure to read the deed did not bar reformation because it was entirely proper for them to rely on the deed since they were entitled to rely on the product of their attorney.[442]

SCHOOLS AND SCHOOL DISTRICTS

Cunningham v. Yellowstone Public School District

In *Cunningham v. Yellowstone Public School District*[443] the court held that Cunningham, principal of an elementary school, was not a third-party beneficiary of the teachers' employment contracts and, therefore, affirmed the school board's decision and the district court's judgment to discharge him as a principal for failure without justifiable cause to perform his contractual duties.[444] Cunningham had claimed that the teachers' testimony at his hearing before the school board should be disregarded because the teachers did not follow the grievance procedures incorporated into their employment contracts.[445] The grievance procedures provided that no formal grievance could be filed with the school board unless the teachers first discussed the grievances with the principal.[446] The teachers had bypassed Cunningham and the grievance procedure because Cunningham was both the subject of the grievance and the school official responsible to hear the grievance.[447] Cunningham argued that because he was a third-party beneficiary of the teachers' employment contract, he could invoke the grievance procedure.[448]

The court held that since he was not the party intended to be benefited by the grievance procedures in the teachers' contracts, he was not a third-party beneficiary and the teachers' grievance procedure could not be invoked.[449] Before a third-party beneficiary can enforce a contract he must be the party intended to be benefited by the promise, and at the time of the promise, the promissor must

441. *Id.*
442. *Id.* at 679. Justice Pederson wrote a short dissent that referred back to his dissent in the earlier appeal. *Id.* Justice Pederson believed that because the Wehners had waited 31 years to bring suit, they did not have a legal remedy. Wehner v. Schroeder, 335 N.W.2d 563, 567 (Pederson, J., dissenting). Pederson concluded that it was a distortion to claim that the Tormaschys had constructive notice of a mistake that occurred over 30 years ago. *Id.*
443. 357 N.W.2d 483 (N.D. 1984).
444. Cunningham v. Yellowstone Pub. School Dist., 357 N.W.2d 483, 487 (N.D. 1984).
445. *Id.* at 486-87.
446. *Id.* at 486.
447. *Id.* at 487.
448. *Id.*
449. *Id.*

have been obligated to the third person so that the third person has at least an equitable right to the benefits of the promise.[450]

TAXATION

Blocker Drilling Canada, Ltd. v. Conrad

In *Blocker Drilling Canada, Ltd. v. Conrad*[451] out-of-state corporate drilling contractors sought a declaratory judgment that original assessments of use tax due on oil drilling rigs brought into North Dakota were final and irrevocable.[452] Under section 57-40.4-02.1 of the North Dakota Century Code a tax is imposed on tangible personal property at the time it is brought into North Dakota if it was not originally purchased for storage, use, or consumption in North Dakota.[453] If the property is used the tax is based on the fair market value of the property at the time it is brought into North Dakota.[454]

At the time the rigs in question were brought into the state the North Dakota Tax Department had no regulations or written guidelines pertaining to the fair market value for oil drilling rigs.[455] Tax consultants, engaged by the taxpayers to handle their use tax obligations in North Dakota, met with the director of sales and special taxes, the official responsible for use tax assessment, and developed a method of assessment to determine the amount of use tax due and made arrangements for payment of the tax due.[456] After these meetings, the director of sales and special taxes sent the tax consultants letters on the tax commissioner's letterhead confirming the meetings and the values upon which the parties had agreed.[457]

The North Dakota Tax Department began conducting field audits on the drilling industry, and based on audit results which utilized book value rather than fair market value, reassessed the tax due and imposed penalties and interest.[458] The taxpayers argued that the tax commissioner was estopped from reassessing or redetermining the use tax or asserting penalties and interest.[459] The

450. *Id.* (citing O'Connell v. Entertainment Enters., 317 N.W.2d 385, 387 (N.D. 1982)). *See* N.D. CENT. CODE § 9-02-04 (1975) (regarding contract enforcement by a third-party beneficiary).

451. 354 N.W.2d 912 (N.D. 1984).

452. Blocker Drilling Can., Ltd. v. Conrad, 354 N.W.2d 912, 914-15 (N.D. 1984). *See* N.D. CENT. CODE § 57-39.2-15 (1983).

453. 354 N.W.2d at 914. *See* N.D. CENT. CODE § 57-40.4-02.1 (1983).

454. 354 N.W.2d at 914.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.* at 915.

North Dakota Tax Department contended that, as a matter of law, estoppel against the government was not available in North Dakota as a remedy in tax matters and that the tax commissioner has an affirmative duty to verify the accuracy of use tax returns and to assess tax deficiencies when necessary.[460]

The supreme court rejected the Tax Department's position that estoppel against the government is not available as a matter of law,[461] holding that estoppel against the government is not absolutely barred as a matter of law, even in matters concerning taxation.[462] The court emphasized that the doctrine of estoppel is not one that should be applied freely against the government, but should be applied on a case-by-case basis.[463] In each case the court should carefully weigh the inequities that would result if the doctrine is *not* applied.[464] The court should also consider the public interest at stake and the resulting harm to that interest if the doctrine *is* applied.[465]

After setting forth the basic elements of estoppel[466] and applying those elements to the facts of the instant case, the court was unable to find that the trial court erred in its determination that the elements of estoppel had been met.[467] The court also added that to deny that the Tax Department is estopped under these facts would result in manifest injustice to the taxpayers.[468] The court reasoned that since revenue collection depends largely upon the voluntary compliance of the taxpayer, the taxpayer is entitled to expect fair play from the Tax Department.[469] In applying the test it set forth, the court stated that the public's interest in revenue collection in this case was outweighed by the taxpaying public's interest in being able to rely on statements made by the Tax Department.[470]

Northwest Airlines, Inc. v. State Board of Equalization

In *Northwest Airlines, Inc. v. State Board of Equalization,*[471]

460. *Id.*
461. *Id.* at 919.
462. *Id.* at 920.
463. *Id.*
464. *Id.*
465. *Id.*
466. *Id. See* Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808, 809 (N.D. 1976).
467. 354 N.W.2d at 920-22.
468. *Id.* at 922.
469. *Id.* The court cited with approval the reasoning of a recent Wisconsin case. *Id. See* Wisconsin Dep't of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 279 N.W.2d 213 (1979).
470. 354 N.W.2d at 922.
471. 358 N.W.2d 515 (N.D. 1984).

Northwest, Republic and Frontier Airlines appealed from a district court judgment in favor of the state of North Dakota denying the airlines relief from the Board of Equalization property tax against them.[472] The North Dakota Supreme Court reversed in part and affirmed in part.[473]

The airlines contended that federal law prohibiting taxation discrimination against interstate commerce[474] preempted conflicting state law which did not provide airlines with the personal property exemptions granted other commercial and industrial personal property in North Dakota.[475] The supreme

472. Northwest Airlines, Inc. v. State Bd. of Equalization, 358 N.W.2d 515, 515 (N.D. 1984).

473. *Id.* at 518.

474. 49 U.S.C. § 1513(d). Section 1513 (d) provides in part:

> (d) *Acts which unreasonably burden and discriminate against interstate commerce; definitions*
> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
> (A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
> (B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
> (2) In this subsection--
> . . . .
> (D) 'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; . . . .
> (3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

Id.

475. 358 N.W.2d at 516. *See* N.D. CENT. CODE § 57-02-27 (1983). Section 57-02-27 provides in pertinent part:

> All property subject to taxation based on the value thereof shall be valued as follows: . . . .
> 3. All commercial, air carrier transportation and railroad property to be valued at ten percent of assessed value.

N.D. CENT. CODE § 57-02-27 (1983)

Section 57-02-08 of the Code provides in pertinent part:

> All property described in this section to the extent herein limited shall be exempt from taxation:. . . .
> 25. All personal property not required by section 4 of article X of the Constitution of North Dakota to be assessed by the state board of equalization shall become exempt from assessment and taxation in the year 1970 and such property shall not be assessed or taxed for that year or for any year thereafter; provided, that this provision shall not apply to any property that is either subjected to a tax which is imposed in lieu of ad valorem taxes or to any particular kind or class of personal property, including mobile homes or house trailers, that is subjected to a tax imposed pursuant to any other provision of law except as specifically provided in this subsection.

N.D. CENT. CODE § 57-02-08(25) (1983).

court held that federal law prohibits assessing and taxing of airline personal property while other commercial and industrial personal property is exempt from taxation.[476] The court concluded that Congress intended that discriminatory state taxes be prohibited because of their adverse impact on interstate commerce.[477]

The court also noted that North Dakota's personal property tax on airline property is not an "in lieu" tax within 49 U.S.C § 1513(d)(3).[478] The court concluded there was no other tax for which the personal property tax may be called a substitute.[479]

TORTS

Day v. General Motors Corp.

In *Day v. General Motors Corp.*[480] the United States District Court, pursuant to Rule 47 of the North Dakota Rules of Appellate Procedure, certified three questions of law to the supreme court.[481] The first question was whether, in a personal injury action based on the theory of strict liability involving an alleged design defect, plaintiff's percentage of fault should be applied to reduce or defeat plaintiff's recovery.[482] The second question was whether, if plaintiff's fault is relevant, a court should consider both plaintiff's accident-producing fault and his injury-enhancing fault.[483] Finally, the third certified question was whether plaintiff could recover even though his fault was as great as, or greater than, the defendant's fault.[484]

The *Day* case involved a personal injury action where the plaintiff fell asleep at the wheel and lost control of the vehicle.[485] As a result Mr. Day was thrown from the vehicle and sustained injuries rendering him a quadriplegic.[486] Day brought his action based on theories of negligence and strict liability.[487] Day contended that his ejection from the car was caused by a defectively designed door latch.[488] He further contended that the defect caused a significant enhancement of the injuries he sustained.[489] GM

476. 358 N.W.2d at 517.
477. *Id.*
478. *Id.* at 518.
479. *Id.*
480. 345 N.W.2d 349 (N.D. 1984).
481. Day v. General Motors Corp., 345 N.W.2d 349, 351 (N.D. 1984).
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.* at 351-52.
486. *Id.* at 352.
487. *Id.*
488. *Id.*
489. *Id.*

argued that Day's injuries were caused by his own negligence and that contributory negligence should be considered in a strict liability claim.[490]

After examining the North Dakota statutes and precedent for the adoption of comparative negligence[491] and strict liability claims,[492] the court concluded that a void existed when a plaintiff had been contributorily negligent in a strict liability claim.[493] The court then examined case law from other jurisdictions that directly addressed this issue.[494] That analysis revealed that generally courts had held that plaintiff's negligence could be considered in strict liability claims.[495] The rationale for adoption of this rule was that without it, a manufacturer would be held absolutely liable for any injuries caused by its product.[496] On this basis the supreme court of North Dakota held that the comparison of causal negligence or fault on a pure form basis in strict liability actions would better promote justice.[497] By "pure form" the court meant that both accident-producing fault and injury-enhancing fault would be considered.[498]

The court then addressed the final question concerning the comparative negligence statute, North Dakota Century Code section 9-10-07, which denied recovery to plaintiffs when their negligence was as great as, or greater than, the defendant's negligence.[499] At issue was whether this absolute bar should apply in strict liability claims.[500] The court, finding no legislation concerning this subject, concluded that contributory causal negligence should not bar recovery in strict liability actions even if the plaintiff's negligence is greater than the defendant's.[501] Instead, the damages would be reduced by the plaintiff's proportion of fault.[502]

Day clarifies some of the issues left open by previous North Dakota cases involving comparative negligence. In *Day* the court concluded that different types of fault, namely negligence and strict

490. *Id.*
491. N.D. CENT. CODE § 9-10-07 (1975); Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979).
492. N.D. CENT. CODE § 28-01.1-05 (Supp. 1983); Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974).
493. 345 N.W.2d at 354.
494. *Id.* at 353-56. *See, e.g.,* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal.Rptr. 380 (1978); Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 634 P.2d 1127 (1981); Seim v. Garavalia, 306 N.W.2d 806 (Minn. 1981).
495. 345 N.W.2d at 353-56.
496. *Albertson*, 230 Kan. 368, 372, 634 P.2d 1127, 1131 (1981).
497. 345 N.W.2d at 357.
498. *Id.*
499. *Id.*
500. *Id.*
501. *Id.*
502. *Id.*

liability, could be compared under the comparative negligence doctrine.[503] Further, the court ruled that even though the plaintiff's fault may be greater than the defendant's fault, the plaintiff is still entitled to damages in strict liability claims.[504]

Mauch v. Manufacturer Sales & Service, Inc.

In *Mauch v. Manufacturers Sales & Service, Inc.*[505] Manufacturers appealed from an order granting the Mauchs a new trial.[506] The Mauchs cross-appealed on three grounds.[507] The district court judge, after considering affidavits of the trial jurors, found the jury proceedings irregular, impeached the jury's verdict, and ordered a new trial.[508] The North Dakota Supreme Court struck the order and held it improper to take juror affidavits that relate to the mental processes of jurors in arriving at a decision into consideration for the purpose of impeaching a verdict.[509]

On cross-appeal the Mauchs first alleged the district court judge erred by failing to grant a new trial on the basis that insufficient evidence existed at trial to support finding Kathleen Mauch fifty percent negligent in causing her own injuries.[510] The court held that the Mauchs failed to show the jury's verdict to be manifestly against the weight of the evidence.[511]

The Mauchs next alleged that North Dakota's comparative negligence statute, section 9-10-07 of the North Dakota Century Code, violates federal and state due process and equal protection rights because a fifty percent negligent plaintiff is denied all recovery.[512] Applying a rational basis standard of review, the court held the statute rationally related to the legislative purpose of tempering the harshness of the contributory negligence doctrine.[513]

The Mauchs' third contention of error was that the district court failed to instruct the jury on a strict liability theory of recovery.[514] The district court had concluded that no distinction exists between a negligent failure-to-warn theory and a strict

503. *Id.* at 351, 358.
504. *Id.*
505. 345 N.W.2d 338 (N.D. 1984).
506. Mauch v. Manufacturer Sales & Serv., Inc., 345 N.W.2d 338, 341 (N.D. 1984).
507. *Id.* at 341-42.
508. *Id.* at 341.
509. *Id.* at 343 (citing Keyes v. Amundson, 343 N.W.2d 78 (N.D. 1983); State v. Bergeron, 340 N.W.2d 51 (N.D. 1983); Kerzmann v. Rohweder, 321 N.W.2d 84 (N.D. 1982); Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964)).
510. 345 N.W.2d at 344.
511. *Id.*
512. *Id.*
513. *Id.* at 344-45.
514. *Id.* at 345.

products liability theory based on failure to warn.[515] The supreme court found the two theories separate and distinct and held that the jury should have been instructed accordingly.[516] The court further held that where assumption of risk and unforseeable misuse are raised as defenses to a strict liability claim, a pure comparative fault analysis applies.[517] The case was remanded only for the purpose of having a jury determine the Mauchs' cause of action under a products liability theory, the negligence cause of action having been fully litigated and presented to the jury.[518]

The final issue raised on appeal was whether the district court erred in denying certain expert witness fees and other costs requested by Manufacturers Sales & Service, Inc.[519] The court found it unnecessary to reach the merits of this issue because it found the Mauchs entitled to a new trial on their products liability cause of action, and thus, costs and fees would be determined anew by the district court.[520]

WITNESSES

In re Thomas Gust

In *In re Thomas Gust*,[521] Gust appealed an involuntary treatment order requiring him to undergo treatment other than hospitalization for a period of ninety days.[522] Gust appealed on the grounds that the court erred by allowing the petitioner's sole expert witness to testify by telephone rather than by personal appearance over Gust's objection.[523]

Gust argued that Rule 43(a) of the North Dakota Rules of Civil Procedure required a witness to be present in court.[524] The court, in considering Gust's argument, looked to the language of section 31-04-04 of the North Dakota Century Code which defines

515. *Id.*
516. *Id.*
517. *Id.* at 347-48. The contributory negligence principles are not relevant to this type of action. However, in view of the legislature's acceptance of comparative negligence principles as demonstrated by its enactment of § 9-10-07 of the North Dakota Century Code, and in following a course which is most fair and just to the parties, the court held that where an unreasonably dangerous defect of a product and the plaintiff's assumption of risk or unforeseeable misuse of the product are concurring proximate causes of the injury suffered, the trier of fact must compare those concurring causes to determine the respective percentages by which each contributed. *Id.* at 348.
518. *Id.* at 349.
519. *Id.*
520. *Id.*
521. 345 N.W.2d 42 (N.D. 1984).
522. *In re* Thomas Gust, 345 N.W.2d 42,43 (N.D. 1984).
523. *Id.* at 43-44.
524. *Id.* at 44. Rule 43(a) of the North Dakota Rules of Civil Procedure provides in pertinent part that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or these rules." N.D.R. CIV. PRO. 43(a).

oral examination as being "in the presence of the jury or tribunal."[525] The court also looked to Rule 3.2(c) of the Rules of Court which limits the instances in which the court will permit oral argument on motions to be heard by telephonic conference to those situations in which the consent of all parties is obtained prior to such oral argument.[526] After reviewing these rules, statutes and definitions, the court determined that "orally in open court" means that a witness testifying in a case must be present in court so that the trier of fact may observe the demeanor of the witness; however, the parties may agree, with court approval, that the testimony may be presented otherwise.[527]

The court determined that North Dakota Century Code section 31-04-04 must be given full credit in an involuntary commitment procedure in order to comply with due process requirements because, although civil in nature, the proceedings closely track the procedures in criminal matters due to the potential loss of an individual's liberty.[528] Therefore, the court concluded that witnesses in involuntary commitment proceedings under chapter 25-03.1 of the North Dakota Century Code must be present in court to present oral testimony unless all the principal parties, with the court's approval, agree otherwise.[529] After reversing Gust's involuntary, alternative treatment order the court stated that the use of preprinted forms to set out findings of fact, although valuable as a checklist, are not appropriate for findings of fact or an order and may per se constitute a basis for reversing or setting aside an involuntary commitment or treatment order.[530]

WRONGFUL DEATH

Hopkins v. McBane

In *Hopkins v. McBane*[531] Antoinette Hopkins appealed from a district court decision dismissing a wrongful death action.[532] Hopkins had brought the suit as surviving parent of Nelvette

525. 345 N.W.2d at 44. Section 31-04-04 of the North Dakota Century Code defines oral examination as "an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness." N.D. CENT. CODE § 31-04-04 (1976).

526. 345 N.W.2d at 44. Rule 3.2(c) of the Rules of Court provides in part that "[t]he court, with the consent of all parties affected, may hear oral argument on any motion by telephonic conference." N.D.R.O.C. 3.2(c).

527. 345 N.W.2d at 44.

528. *Id.* at 45.

529. *Id. See* N.D. CENT. CODE ch. 25-03.1 (1978 & Supp. 1983).

530. 345 N.W.2d at 46.

531. 359 N.W.2d 862 (N.D. 1984).

532. Hopkins v. McBane, 359 N.W.2d 862, 863 (N.D. 1984).

McDonald, a viable fetus whose death and resultant stillbirth was alleged to be the result of defendant's negligence.[533] The district court ruled that North Dakota Century Code section 32-21-01 does not authorize an action to be brought on behalf of a stillborn child.[534] The sole issue on appeal was whether North Dakota's wrongful death statute authorizes an action on behalf of a viable unborn child.[535]

The supreme court determined that there are two requirements to maintain a wrongful death action: "(1) a death caused by conduct which would have entitled the deceased to bring an action for damages if death had not ensued, and (2) death of a person."[536] The court had to determine whether a child, if born alive, could bring an action for prenatal injuries.[537] The supreme court followed the weight of authority and held that a child who is born alive has a cause of action for prenatal injuries cause by the tortious conduct of another.[538] The court next had to determine whether the stillbirth of a child constitutes the death of a person for the purposes of North Dakota's wrongful death statute.[539] The court referred to North Dakota Century Code section 14-10-15 to determine whether an unborn child was a person for purposes of the wrongful death statute.[540] The court stated that the purpose of the section is to ensure and to protect the interests of a child subsequent to its conception but prior to its birth.[541] The court determined that it was inconsistent with this section for the trial court not to confer "person" status upon a stillborn child for purposes of applying the wrongful death statute.[542] The supreme court looked to the commonly understood meanings to determine that an unborn child is a human being that has life prior to the process of birth and can experience death.[543]

The supreme court held that North Dakota Century Code section 32-21-01 authorizes a wrongful death action against one whose tortious conduct causes the death of a viable unborn child.[544] The district court decision was thereby reversed and the case was remanded for a trial on the merits.[545]

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533. *Id.*
534. *Id. See* N.D. CENT CODE § 32-21-01 (Supp. 1983).
535. 359 N.W.2d at 863.
536. *Id.* at 864.
537. *Id.*
538. *Id.*
539. *Id.*
540. *Id. See* N.D. CENT. CODE § 14-10-15 (1981).
541. 359 N.W.2d at 864.
542. *Id.*
543. *Id.* at 865.
544. *Id.*
545. *Id.*